Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

SOMATERIA FOUNDATION, FINANCIERA EURO-AMERICANA CORP., DAYRA MARIA LEVOYER JIMENEZ, AND JORGE HUGO REYES TORRES,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a civil forfeiture proceeding, does the Due Process Clause of the Fifth Amendment require that the government mail notice of the proceedings to an interested party when the government knows the party's correct address and also knows that the party is incarcerated in a foreign country?

2. Is a Motion to Set Aside Entry of Default and Default Judgment timely when the motion is filed within one year of the date of entry of the default judgment, and the moving party could not file the motion sooner due to the fact that he was indigent and incarcerated in a foreign prison during all relevant times?

3. Are potential claimants in a civil forfeiture case accorded due process when the notice mailed by the government fails to specify a deadline for filing a claim and is not mailed in a timely manner?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The United States of America,

Plaintiff-Appellee,

v.

All monies from account no. PO-204,675.0, formerly held at the Swiss Bank Corporation of Zurich, Switzerland; and account no. 01327947-001.1.840, formerly held at the Bank Von Ernst Und Cie, previously WPE Wirtschaftsund Privatbank, Zurich, Switzerland, in the names of Somateria Foundation and Financiera Euro-Americana Corporation,

Defendants,

Somateria Foundation, Financiera Euro-Americana Corporation, Dayra Maria Levoyer Jimenez, and Jorge Hugo Reyes Torres,

Claimants-Appellants.

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OPINIONS BELOW

On October 29, 1998, the United States Court of Appeals for the Tenth Circuit issued an unpublished opinion in United States v. All Monies from Account No. PO-204,675.0, No. 97-1250 (10th Cir. December 7, 1998). This opinion is the subject of this Petition for Writ of Certiorari. A copy of the Court of Appeals opinion is included in the Appendix at page 4a. (App. B) The District Court entered its order denying Claimants' Motion to Set Aside Entry of Default and Default Judgment on May 9, 1997. A copy of the District Court's oral findings of fact and conclusions of law is included in the Appendix at pages 33a-36a. (App. D) A copy of the District Court's Minute Order is included in the Appendix at pages 30a-32a. (App. C) The Court of Appeals issued another unpublished opinion in Claimants' prior appeal in this case. United States v. All Monies from Account No. PO-204,675.0, No. 95-1095 (10th Cir., July 5, 1996). A copy of the this opinion is included in the Appendix at pages 37a-44a. (App. E) In the prior appeal, the Court of Appeals reversed the District Court's Order denying Claimants' Motion to Set Aside Entry of Default and Default Judgment, which Order the District Court entered on December 14, 1994. The text of the original District Court Order is included in the Appendix at pages 45a-47a. (App. F)

BASIS FOR JURISDICTION

The Supreme Court has jurisdiction to consider this Petition for Writ of Certiorari.

Date Order and Judgment Below was Entered

The United States Court of Appeals for the Tenth Circuit issued the opinion that is the subject of this Petition on October 29, 1998. (App. B at 4a)[1] Claimants timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 11, 1998. Fed. R. App. P. 40(a).

Date of Order Denying Petition for Rehearing

The Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing *En Banc* on December 7, 1998. (App. A at 2a) This Petition for Writ of Certiorari is timely as it is filed within 90 days of the date the Petition for Rehearing was denied. Supreme Court Rule 13.3.

Statutory Basis for Jurisdiction

The Supreme Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] Citations to material in the Appendix are abbreviated in the form, "App. C at 31a".

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The following constitutional provisions, statutes, and rules are involved in the issues presented in this Petition for Writ of Certiorari. The text of each is set forth in full in the Appendix.

U.S. Const. amend. V

19 U.S.C. § 1607(a)

21 U.S.C. § 881(d)

Fed. R. Civ. P. 60(b)

Fed. R. Civ. P. C(6)

STATEMENT OF THE CASE

Basis for Federal Jurisdiction in Court of First Instance

The District Court has original jurisdiction of actions brought under the laws of the United States and actions in which the United States is a plaintiff. 28 U.S.C. §§ 1331 and 1345. The United States was the plaintiff in the District Court, and the United States brought this action under the provisions of 18 U.S.C. §§ 981, 1956, 1957; and 21 U.S.C. § 881, concerning the civil forfeiture of proceeds of money laundering and illegal narcotics trafficking activities.

Facts Material to Consideration of Questions Presented

On June 19, 1992, the Government of Ecuador, in concert with agents from the United States Drug Enforcement Agency (the "DEA"), raided the Rancho San Antonio (the "Ranch"), a 2,800 hectare ranch located west of Quito, Ecuador. (App. R at 69a) The Ranch was the home of Claimant Jorge Hugo Reyes Torres ("Reyes Torres") and his common-law wife, Claimant Dayra Maria Levoyer Jimenez ("Levoyer Jimenez"). The couple lived on the Ranch with their four children (collectively, the "Reyes Levoyer" family), who ranged in age from 3 to 13. (Id. at 70a) The Ranch was also the base of operations for many of the business interests operated by Reyes Torres. (Id. at 69a)

In the Affidavit of Jorge Hugo Reyes Torres, which was attached to Claimants' Motion to Set Aside Entry of Default and Default Judgment (the "Motion to Set Aside), Reyes Torres details the businesses he ran, his professional experience, and the legitimate and legal sources of his once considerable wealth. (App. Q at 70a-72a) Reyes Torres notes that the activities of the businesses were documented in records seized in the raid and that the records are still in the possession of the governments of the United States and Ecuador. (Id. at 72a)

On the day of the raid, Reyes Torres and Levoyer Jimenez were arrested and taken into custody. (Id.) 60 people who lived and worked on the Ranch, including members of the Reyes Levoyer family, were also arrested. (Id.) The Reyes Levoyer children were placed in the care of their maternal aunt, with whom they resided until Levoyer Jimenez was released from prison in 1998. (Id. at 70a) To date, 50 of the original 60 arrested individuals have been released, although Reyes Torres remains incarcerated to this day. (Id. at 69a)

The only "evidence" of allegedly illegal activity obtained from the raid was documents that revealed the existence of a number of bank accounts in Europe, South America, and the United States; which accounts were owned or controlled by the Reyes Torres family. In 1992, using information obtained from the seized account documentation, the government filed two forfeiture actions in the District of Colorado against "Reyes Family" bank accounts located in the United States. The first action was filed on July 17, 1992. United States v. All Monies, Civil Action No. 92-C-1398. This case was concluded on December 30, 1992, by entry of default judgment. The total amount forfeited in the case was $181,975.84. The second action was filed November 13, 1992. United States v. $482,709.70, Civil Action No. 92-C-2249. This case was concluded on April 19, 1993, again by default judgment. The total amount forfeited was $482,709.70. No claims were ever filed in these actions, and the forfeiture judgments were not appealed.

The government commenced the instant matter on August 4, 1993. In the Verified Complaint for Forfeiture In Rem, the government alleged that funds in two Swiss bank accounts represented proceeds of drug trafficking and money laundering activities on the part of Jorge Hugo Reyes Torres and the "Reyes family" of Ecuador. (App. A at 5a) On August 11, 18, and 25, 1993, the government published notice of the seizure and pending forfeiture in *The Denver Post*. (Id. at 6a) On August 17, 1993,

four days prior to the deadline for filing a claim[2], the government mailed notice of the proceedings to three of the four Claimants herein. (Certificate of Service; App. Q at 66a) Specifically, the government mailed copies of the Verified Complaint, the Order for Arrest of Property In Rem, the Warrant for Arrest of Property In Rem, and the Notice of Arrest and Procedure to Reyes Torres and to the two "Foundation Claimants", the Somateria Foundation and Financiera Euro-Americana Corporation.

The Foundation Claimants were the nominal owners of the seized accounts.[3] (App. Q at 66a) The Somateria Foundation account was opened in September, 1989, with a deposit of approximately eight million dollars. (App. R at 74a) The funds represented the principal and accumulated interest from an initial deposit in the Swiss Bank Corporation that was made in May, 1985, in the amount of five million dollars. (Id., at 72a-75a) The foundations were created with the assistance of a Liechtenstein law firm as a vehicle to hold and manage the funds for the benefit of the Reyes Levoyer family. (App. R at 72a) Levoyer Jimenez and Reyes Torres were legal beneficiaries of 80% of the money in the accounts. (App. B at 22a) In May, 1990, Levoyer Jimenez traveled to Europe to accept her appointment as legal representative of the foundations, and she immediately assigned that responsibility to a Liechtenstein attorney, Dr. Herbert Batliner. (Id.) Levoyer Jimenez was one of only two individuals authorized to sign on the accounts. (Id.)

Despite her obvious and significant interest in the seized accounts, the government did not mail notice of the forfeiture proceedings to Levoyer Jimenez. (Id. at 8a) The reason the government failed to mail notice to Levoyer Jimenez is unknown. (Id. at 25a) The omission is all the more puzzling because the

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[2] As the first date of publication was August 11, 1993, any claims had to be filed no later than August 21, 1993. Fed. R. Civ. P. C(6).

[3] A "foundation" is a legal entity, analogous to a trust, recognized under Swiss law.

government had sent notice to Levoyer Jimenez in previous forfeiture proceedings Reyes Torres. (Id.)

In March, 1993, approximately five months before the instant case was filed -- a friend of Reyes Torres, Mr. Jose Ontaneda, traveled from his home in Chicago to visit the U.S. Attorney's Office in Denver, Colorado. (App. V at 89a) The purpose of the visit was to inquire about "a case involving money taken from Swiss bank accounts", namely, Civil Action No. 92-C-2249, which had been filed in November, 1997. (Id. at 90a) While at the U.S. Attorney's Office, Mr. Ontaneda spoke to a Ms. Patricia Smith. (Id.) Ms. Smith explained to Mr. Ontaneda that her office represented the government, that the government was "fighting" with Reyes Torres, and that she was not allowed to give Mr. Ontaneda advice on how to help Reyes Torres. (Id.) After Ontaneda left the U.S. Attorney's office, three DEA agents paid a visit to Ontaneda at his hotel room. (Id. at para. 4.) The agents advised Ontaneda that they had "checked out" Ontaneda and his family. (Id.) The agents advised Ontaneda to have no further contact with Reyes Torres, and then they left. (Id.) The encounter frightened Ontaneda, and he returned to Chicago immediately. (Id.) Later in 1993 (probably August or September), Ontaneda contacted a Spanish-speaking lawyer in Denver about representing Reyes Torres.[4] (Id. at para. 6) The attorney told Ontaneda that he would check into the matter, but Ontaneda did not hear from the attorney again. (Id.) During this visit, Ontaneda obtained a Denver phone book, tore out the "Attorneys" listings from the Yellow Pages, and mailed the pages to Reyes Torres. (Id.) After this, Ontaneda took no further action on behalf of Reyes Torres. (Id.)

On September 14, 1993, the government filed a Motion for Default Judgment and Final Order of Forfeiture in the instant case.

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[4] The attorney was Christopher Miranda. Mr. Miranda also did not enter his appearance in this or any other case on behalf of Reyes Torres, nor did he ever meet with or otherwise contact Reyes Torres or Levoyer Jimenez.

(App. B at 6a) No one had filed a claim to the funds within the time allowed by law. (Id.) The District Court granted the government's motion for default judgment on October 21, 1993. On October 25, 1993, the court entered its Default Judgment and Final Order of Forfeiture. The total amount forfeited to the government from the two accounts was $11,499,068.34.[5] (Id.)

Throughout the proceedings described above, Reyes Torres and Levoyer Jimenez remained incarcerated in Quito, Ecuador. As a result, it was extremely difficult for the two to communicate with attorneys in the United States, and it was virtually impossible to keep track of the various forfeiture cases in progress there. (See, App. R at 75a-77a). Until January, 1994, Reyes Torres was not allowed to use the phone in the prison, and he was not allowed to leave his cell except for eight hours a week. (Id. at 75a) To this day, Reyes Torres can only visit with attorneys on a limited basis, while other prisoners may have unlimited visits with attorneys (Id. at 76a) Reyes Torres' mail is opened and read by prison authorities before it is delivered to him, making confidential legal communication impossible. (Id.)

Because of the circumstances, any communication between the Reyes Levoyer' and attorneys in the United States had to occur through intermediaries or in meetings at the prison. (Id.) A face-to-face meeting could only occur if an attorney traveled to Ecuador and went to the prison. Despite these obstacles, Reyes Torres did eventually make contact -- through the intermediary of a Columbian attorney -- with a Spanish-speaking attorney in Miami by the name of Irwin Lichter. (Id.) (Neither Reyes Torres nor Levoyer Jimenez speaks English.) Mr. Lichter agreed to fly to Ecuador to see Reyes Torres, and the two managed to have a single, brief meeting at the

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[5] Of this total, the amount forfeited from defendant account PO-204,675.0, which was held by Claimant Somateria Foundation for the benefit of the individual Claimants herein (the "Somateria account"), was $11,134,803.34. The amount forfeited from account 01327947-001.1.840, held by Financiera Euro-Americana (the "Financiera account"), was $364,265.00.

prison in September of 1993. (Id.)[6] The purpose of the meeting was to discuss the criminal case against Reyes Torres' brother, Ramiro Reyes Torres, which was pending in the District of Florida. (App. T at 84a) During his meeting with Reyes Torres, Lichter had the opportunity to personally observe conditions at the prison. (Id. at 84a-84a) Based upon his observations, Lichter stated that it was surprising that Reyes Torres was able to formulate a response in the instant case at any time. (Id.)

The meeting between Lichter and Reyes Torres did not result in Reyes Torres hiring Lichter to represent him in connection with the instant forfeiture proceedings because Reyes Torres was unable to retain him. (App. R at 77a) In November, 1993, Reyes Torres was able to hire an attorney from Columbia, Dr. Jose Caisedo. Unfortunately, Dr. Caisedo did little to pursue Reyes Torres' interests, and within a year Caisedo became entirely "incommunicado" to Reyes Torres. (Id. at 77a) In addition, the Liechtenstein law firm of Dr. Dr. Batliner & Partners, which had been representing the interests of Claimant Somateria prior to the seizure of the Swiss accounts, formally resigned from representation of Somateria in July, 1992. The law firm did not notify the individual Claimants of the firm's withdrawal until December, 1993. (Id.)

In February, 1994, Lichter received a request from Reyes Torres (again through an intermediary) to find out about the status of the instant case. (App. T at 84a) In response, Lichter contacted Colorado Springs attorney Richard L. Tegtmeier. (Id.) At Lichter's request, Tegtmeier contacted Assistant U.S. Attorney James S. Russell to inquire into the status of the case, the possibilities for a negotiated settlement, and to get an idea of how much work would be involved. (App. U at 87a) According to Tegtmeier, Russell described the "huge international scope" of the case, and Russell estimated the case would require approximately

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[6] The next time Reyes Torres was able to meet with an attorney from the United States was in mid August, 1994, when claimants' attorney, William R. Kelso, traveled to Ecuador. (Id.)

50 deposition at locations in Europe and South America. (Id., at para. 4.) After his conversation with Russell, Tegtmeier contacted Lichter to discuss a potential retainer for Tegtmeier's services. It was clear that Claimants could not afford to hire Tegtmeier. After the discussion regarding his fee, Tegtmeier did not have any further contact with Lichter or with anybody else connected with this case. (See, Id., at paragraphs. 5 and 6.)

The reason Reyes Torres could not afford to hire either Tegtmeier or Lichter is that the government of Ecuador had confiscated virtually *all* of Reyes Torres' and Levoyer Jimenez' property in connection with the raid on the Ranch, (App. R at 71a) The Ecuadorian authorities took possession of the Ranch and everything on it. (Id.) All of the family's business assets, bank accounts, and automobiles were forfeited to the government of Ecuador, as was all the personal property owned by the Reyes Levoyer' family. (Id.) With all of their property confiscated and all of their accounts frozen, Reyes Torres and Levoyer Jimenez simply did not have the means to hire an attorney. This situation did not change until August, 1994, when Reyes Torres was able to hire Mr. Kelso. After meeting Reyes Torres in Ecuador in mid August, with only two months to go before the one-year filing deadline, Mr. Kelso immediately began investigating the case and doing research in preparation for drafting the Motion to Set Aside, which was filed on October 21, 1994.

In the Motion to Set Aside, Claimants sought relief under Rules 60(b)(1), 60(b)(3), 60(b)(4), and 55(c), Fed. R. Civ. P. (App. E at 39a) On December 1, 1994, the government filed a response to Claimants' motion. On December 12, 1994, Claimants filed a motion seeking leave to file a reply to the government's response. On December 15, 1994, the District Court denied Claimants' motion without a hearing and without ruling on Claimants' request to file a reply. The District Court ruled that Claimants' Motion to Set Aside was not filed within a reasonable time because the government alleged in its response that the United States Attorney's Office had been contacted by "numerous attorneys and agents acting on Claimants' behalf with respect to the forfeiture

of the funds." (App. F at 47a) Thus, the District Court concluded that Claimants were not justified in waiting nearly a year to challenge the default judgment. (Id.) On December 23, 1994, Claimants filed a Motion for Reconsideration. Claimants submitted detailed affidavits from Ontaneda, Tegtmeier, and Lichter in order to controvert the government's allegations that "numerous agents and attorneys" were acting on Claimants' behalf. The District Court denied Claimant's Motion for Reconsideration without comment. (See, App. B at 7a)

Claimants appealed the District Court's denial of the Motion to Set Aside to the United States Court of Appeals for the Tenth Circuit. In an unpublished opinion, the Court of Appeals reversed the District Court's denial, holding that the District Court should have ruled on Claimants' request to file a reply brief before it ruled on the merits of the Motion to Set Aside. (App. E at 37a-44a) The Court of Appeals remanded the case with instructions that the District Court should consider, and rule on, Claimants' motion to file a reply brief before ruling on the Motion to Set Aside. (Id. at 42a) On remand, the District Court granted Claimants' motion to file a reply brief and conducted a hearing on the Motion to Set Aside. At the conclusion of the hearing, the District Court again denied Claimants' Motion to Set Aside. For the second time, Claimants appealed the District Court's denial to the Court of Appeals.

On appeal, Claimants argued 1) that the default judgment is void for want of due process as to Claimant Levoyer Jimenez because the government failed to mail notice to her, 2) that the default judgment is void as to the other Claimants because the government did not mail the notice in a timely manner and the notice did not specify a deadline for filing a claim, and 3) that the District Court abused its discretion by denying Claimants' Motion to Set Aside as untimely under the circumstances.

In a divided opinion, the Court of Appeals affirmed the District Court's ruling.[7] (App. B at 4a-29a) The Court of Appeals held that the government discharged its duty of providing notice to Levoyer Jimenez because it mailed notice to the address of the registered agent of Somateria in Liechtenstein and to the bank in Switzerland where the accounts were held. (Id., at 11a-12a) The Court of Appeals also held that Claimants suffered no injury as a result of late or inadequate notice because Claimants did not file a claim by the "outside deadline" of 10 days after they received the notice -- although the date Claimants received the notice does not appear anywhere in the record. Finally, the Court of Appeals held that the District Court did not abuse its discretion in denying the Motion to Set Aside as untimely. (App. B at 19a)

In a separate opinion, Holloway, Circuit Judge, both concurred with and dissented from the majority opinion. Judge Holloway wrote that the District Court's denial of the Motion to Set Aside should be affirmed as to all Claimants *except Ms. Levoyer Jimenez*:

> The core of the undisputed facts here brings to bear basic due process principles. As it did when it notified Ms. Levoyer less than a year earlier about other forfeiture proceedings, the government should have mailed notice to her as the Supreme Court instructed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). After rejecting constitutional objections to published notice to beneficiaries whose interests or addresses are unknown, the Court held: "As to known present beneficiaries of known place of residence, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicality notice must be such as is reasonably calculated to reach interested parties. Where the names and post

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[7] The three judge panel was divided two to one.

office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318 (emphasis added). As it did by mailing notice of the instant forfeiture proceeding to Mr. Torres at his place of imprisonment, the government should have given notice by mail to Ms. Levoyer at the woman's prison to satisfy the "elementary and fundamental requirement of due process...." Id., at 314; *see also*, Mennonite Board of Missions v. Adams, 462 U.S. 791, 795 (1983).

(App. B at 26a) (Citations to the record omitted.)

This Petition for Writ of Certiorari followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. **By holding that the government provided adequate notice to Levoyer Jimenez, the Court of Appeals decided an important question of federal due process in a way that conflicts with relevant decisions of this Court.**

In the Court of Appeals, the majority held that the government accorded Levoyer Jimenez due process by mailing notice of the forfeiture proceeding to the Somateria Foundation in care of the Liechtenstein law firm. (App. B at 10a) The majority concluded that such notice was "reasonably calculated" to provide actual notice to Levoyer Jimenez because Levoyer Jimenez had executed a power of attorney which authorized the Liechtenstein lawyers to act on her behalf in matters relating to the management of the Somateria Foundation.[8] The record does not support the majority's conclusion.

The record is clear that the Liechtenstein law firm withdrew from its representation of Levoyer Jimenez more than a year before the government mailed out notice of the forfeiture proceedings. (Id. at 23a) This fact does not impress the majority, however, as much as the "suggestion" in Levoyer Jimenez' affidavit that she had a relationship with one of the Liechtenstein lawyers, Dr. Herbert Batliner, that was "independent" of her relationship with Dr. Batliner's firm. (Id. at 10a) But the majority's hypothesis is sheer speculation, as the dissent recognizes:

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[8] In support of this conclusion, the majority observes that the means employed by the government to provide notice to Levoyer Jimenez were "as certain to ensure actual notice" as mailing notice to her at the Ecuadorian prison, "especially in light of her and Reyes Torres' testimony that mail sent to them in prison was not always delivered". (Id. at 12a) This point hardly merits discussion. The fact that Levoyer Jimenez *might* not receive notice at the prison does not excuse the government from its obligation to mail it to her there.

> The majority suggests that the Liechtenstein lawyer served in a dual capacity... and that [Levoyer Jimenez'] "ambiguous" statement on the lawyer's withdrawal said nothing about his relationship with Ms. Levoyer. This suggestion is one never raised by the parties and it was not discussed by the District Court judge in her oral findings and ruling. She merely said from the bench that it "would appear that there was proper notice given to the proper parties, not only Mr. Reyes, but also the bank, also the two foundations, and the notice indicates they were sent by registered mail." *I would not base a decision on our serious due process issue on such a suggestion that the majority relies on.*
>
> (App. B at 24a) (Citations to the record omitted and emphasis supplied.)

Indeed, the record contains absolutely no facts to even *suggest* that attorney Batliner continued to act on Levoyer Jimenez' behalf after his firm withdrew in 1992. There is simply no factual basis to support the majority's conclusion, and the decision on the "serious due process issue" is clearly in conflict with relevant prior decisions of this Court.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court observed that the Due Process Clause requires, at a minimum, that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case". Mullane, 339 U.S. at 313, 70 S.Ct. at 656-57. In Mullane, this Court held that published notice to the beneficiaries in an action for judicial settlement of trust accounts is inadequate when the names and addresses of the beneficiaries are known. 339 U.S. at 307, 70 S.Ct. at 654. In deciding the issue, the Court articulated a standard for determining whether notice is adequate

under the Due Process Clause in cases where the state acts to deprive a person of a protected property interest:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

339 U.S. at 314, 70 S.Ct. at 657.

The standard articulated in Mullane has withstood the test of time. In Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), this Court acknowledged its "unwavering" adherence to the principle announced in Mullane, citing a number of prior opinions where the Court found published or posted notice to be inadequate. (See, Mennonite, 462 U.S. at 797, 103 S.Ct. at 2710-2711; and the cases collected therein.) In Mennonite, this Court determined that the due process rights of a mortgagee of real property were violated when the State of Indiana sold the property for non-payment of taxes after the State published and posted notice of the tax sale as required under Indiana law. 462 U.S. at 792-795, 103 S.Ct. at 2708-2709. In Mennonite, the Court seemed to strengthen due process protections by holding that mailed notice is required not just in cases where the names and addresses of beneficiaries are known but also in cases where the names and addresses can be discovered easily.

> Notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 800, 103 S.Ct. at 2712. *See also*, Tulsa Professional Collection Services, Inc., v. Pope, 485 U.S. 476, 108 S.Ct. 1340 (1988) (holding that publication notice to creditors in a probate proceeding violates due process when the identities of creditors is "reasonably ascertainable", reaffirming adherence to Mullane). Tulsa Professional Collection Services, 485 U.S. at 490, 108 S.Ct. at 1347.

A theme common to Mullane, Mennonite, and Tulsa Professional Collection Services is the recognition that notice by publication is no more than "a feint" as compared to actual notice. See, Mennonite, 462 U.S. at 795, 103 S.Ct. 2710; *citing*, Mullane, 338 U.S. at 315, 70 S.Ct. at 652. But the Mullane standard does not just apply in cases of publication or posted notice. This Court has also applied Mullane in cases where the State mails notice but does not use knowledge that it has at its disposal to ensure that the mailed notice is effective.

In Robinson v. Hanrahan, 409 U.S. 37, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972), this Court applied Mullane to evaluate the sufficiency of mailed notice in civil forfeiture proceedings under the State of Illinois vehicle forfeiture statute. Robinson, 409 U.S. at 38, 93 S.Ct. at 30. In Robinson, the owner of an automobile was arrested for armed robbery and his automobile was forfeited to the State while he was in jail awaiting trial. Id. The State of Illinois mailed notice of the forfeiture proceedings to the owner's home as required by State law, but not to the jail. 409 U.S. at 39-40, 93 S.Ct. at 30-31. As a result, the owner did not learn that of the proceedings until he was released and the automobile had already been forfeited. 409 U.S. at 39, 93 S.Ct. at 31. The owner filed a motion for rehearing in the forfeiture proceeding, which was denied. Id.

On appeal, the Supreme Court of Illinois held that the notice did not deprive the owner of due process because such service was sufficient in *in rem* actions. Id. This Court disagreed. Id. Citing Mullane, this Court pointed out that the Due Process

Clause of the Fourteenth Amendment does not depend on such "vague classifications" as *in rem* or *quasi in rem*. Robinson, 409 U.S. at 39, 93 S.Ct. at 31; see also Mennonite, 462 U.S. at 796, n. 3 (noting that in Mullane the Court rejected the notion that due process rights vary depending on the classification of an action as *in rem* or *in personam*). On the other hand, it is apparent that the State's knowledge of the circumstances individual is an important factor in determining whether the notice provided is adequate, especially when the State knows that the individual is not likely to receive the notice provided:

> [T]he State knew that appellant was not at the address to which the notice was mailed and, moreover, knew also that appellant could not get to that address since he was at that time confined in the Cook County Jail. Under these circumstances, it cannot be said that the State made any effort to provide notice which was "reasonably calculated" to apprise appellant of the pendency of the forfeiture proceedings.

Robinson, 409 U.S. at 40, 93 S.Ct. at 31-32; *see also*, Schroeder v. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962); Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956); Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953).

The decision of the Court of Appeals conflicts with each of the above precedents. There is no question that Levoyer Jimenez was entitled to notice under the Mullane analysis, inasmuch as she possessed a "substantial property interest" that was "significantly affected" by the forfeiture proceedings.[9] See, Mennonite, 462 U.S.

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[9] "[T]he evidentiary matter submitted makes an undisputed showing that Ms. Levoyer had a beneficial interest in the funds seized in the instant forfeiture proceeding". (App. B at 22a-23a)

at 798, 103 S.Ct. at 2711. The only issue was whether the government provided notice "reasonably calculated" to apprise her of the pendency of the forfeiture proceedings under the circumstances. In light of Robinson, it is obvious that it did not. In the instant case, as in Robinson, the government knew Levoyer Jimenez' correct address but chose to not mail notice there.[10] Also, the government knew that Levoyer Jimenez was not at the addresses in Liechtenstein and Switzerland where the notices were mailed, and it knew that Levoyer Jimenez could not get to those addresses because she was confined in prison in Ecuador. Thus, as in Robinson, it cannot be said that the government made efforts to provide adequate notice to Levoyer Jimenez in the instant case.

2. **By affirming the District Court's denial of the Motion to Set Aside on timeliness grounds, the Court of Appeals entered a decision in conflict with the decision of another United States court of appeals and with a relevant decision of this Court on the same important matter.**

In the Court of Appeals, Claimants argued that the District Court abused its discretion in denying Claimants' Motion to Set Aside Entry of Default and Default Judgment on timeliness grounds. (App. B at 8a) The Court of Appeals affirmed the District Court because the Court of Appeals could not say that there was no reasonable basis for the District Court's decision. (Id.) This Court should grant Claimants' Petition for Writ of Certiorari because the decision of the Court of Appeals conflicts with the decision of this Court in Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384 (1949); and with the decision of United States Court of Appeals for the Seventh Circuit in United States v. $48,595.00, 705 F.2d 909 (7th Cir. 1983).

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[10] The government does not deny that it was aware of Levoyer Jimenez' address at the prison. It is undisputed that the government had mailed notices to her at the prison address in previous forfeiture proceedings. (See, App. B at 24a)

Federal Rule of Civil Procedure 55(c) provides: "For good cause shown the Court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." (App. J at 51a) Motions for relief from judgment under Rules 60(b)(1), (2), and (3) must be filed within a "reasonable time", and in no event later than one year after entry of judgment. Rule 60(b), Fed.R.Civ.P. (App. K at 52a) A district court's denial of a motion under Rule 60(b), Fed.R.Civ.P. is reviewed according to the abuse of discretion standard. White v. American Airlines, 915 F.2d 1414, 1425 (10th Cir. 1990).

As described above, Claimants faced a virtually impossible task in trying to obtain legal representation and to file a response in this action. In spite of Claimants' difficult circumstances, the District Court twice denied Claimants' Motion to Set Aside as untimely because the motion was not filed within a "reasonable time". On remand after the first appeal, the hearing on Claimants' Motion to Reconsider was heard before a different district judge than the judge who originally denied Claimants' Motion to Set Aside. The result, however, was the same. The District Court noted that there were "attorneys who contacted the U.S. Attorney's Office", which fact indicated to the District Court that Claimants knew the funds were being forfeited, "so they could have done something, even asked for a continuance. They did nothing." (App. D at 35a) The District Court found that Claimants "sat on their rights". (Id.)

As noted above only one attorney contacted the U.S. Attorney's office. On appeal, the Court of Appeals acknowledged that the original district court order denying Claimants' Motion to Set Aside "overstated the amount of contact between the U.S. Attorney's Office and individuals representing Reyes Torres". (App. B at 19a) Nevertheless, in view of the evidence that Reyes Torres was "aware of the forfeiture proceedings and had at least some contact with individuals in the United States", the Court of Appeals concluded the District Court did not abuse its discretion in finding that Claimants' Motion to Set Aside was not filed within a reasonable time. (Id. at 21a)

In a case with facts very close to the instant case, the Seventh Circuit concluded that the district court did abuse its discretion in denying the claimant's Rule 60(b)(1) motion on timeliness grounds. In United States v. $48,595.00, 705 F.2d 909 (7th Cir. 1983), the claimant, one John Weed, arrived at Chicago's O'Hare Airport carrying approximately $66,000.00 worth of cash and deutsche marks. He failed to declare this fact to Customs officials, who spotted the cash. Weed was arrested for false reporting, and the money was seized. Id., at 910-911.

After his arrest, Weed was permitted to return to Germany on a personal recognizance bond. While there, Weed was arrested and incarcerated for a narcotics offense. On July 28, 1980, the United States commenced a civil forfeiture proceeding against the cash. Weed, who was still in prison in Germany, was mailed notice of the forfeiture proceeding. The government also mailed notice to Weed's brother and the attorney in the United States that represented Weed at his bond hearing. No one filed a claim, and on November 28, 1980, the government filed a motion for default judgment. A hearing on the government's motion was set for December 5, 1980, and notice of the hearing was again mailed to Weed, Weed's brother, and Weed's attorney. No one appeared at the December 5th hearing, and the court entered a default judgment and final order of forfeiture on that date. Id.

Weed was released from prison in July, 1981. On November 13, 1981, forty-nine weeks after entry of the default judgment, Weed filed a motion under Rule 60(b)(1), seeking to set aside the forfeiture judgment on the grounds of excusable neglect. Id., at 912. The district court denied Weed's motion.

On appeal, the government argued that Weed's delay in filing the motion was not "reasonable" for three reasons: 1) Weed received notice of the action and the hearing; 2) Weed's attorney in the United States could have acted on his behalf in the forfeiture proceedings; and 3) Weed could have filed a motion from prison in Germany pro se. Id. The Seventh Circuit found the government's arguments unpersuasive. The court noted that Weed had been

incarcerated, broke, and without sufficient legal wherewithal to contest the forfeiture *pro se*:

> [I]f Weed's allegations are true, he was indigent as a result of the United States having seized his entire life savings. Any opportunity he might otherwise have had to engage United States counsel, from a German prison, was diminished to virtual non-existence. Id.

The court also noted that Weed understood that the government had offered to return half of the money. Id. As to Weed's receipt of notice, the court opined that the notice was of little value to Weed if he lacked the ability to protect his interests as a result of his confinement. Id., at 913. Finally, the court noted that Weed acted promptly to file the Rule 60(b) motion upon his return to the United States. Id.

In light of these facts, the Seventh Circuit found that the 49 week delay in filing the Rule 60(b) motion was reasonable:

> The combination of circumstances presented in this case -- Weed's lack of funds, his imprisonment in a foreign country, the absence of counsel acting on his behalf in the forfeiture proceeding, and Weed's understanding that the government was going to return half of the seized money -- support the conclusion that the forty-nine week delay in Weed's filing of a Rule 60(b) motion was reasonable. Id. at 913.

Like Weed, claimants in this case were broke and incarcerated in a foreign country during the time when they should have appeared in the forfeiture action. Unlike Weed, who was released from prison five months prior to the expiration of the filing deadline, claimants were incarcerated *throughout* the one-year filing period, and Reyes Torres remains incarcerated to this day. Like Weed, claimants' receipt of notice was of little value given their inability to act to protect their interests. And, like Weed,

claimants' acted promptly to file their motion when they were finally able to do so.

The only factual distinction of significance between the instant case and $48,595.00, is that Weed had apparently been told that half of the forfeited money would be returned to him. $48,595.00, 705 F.2d at 912. Unfortunately, it is impossible to tell any particulars about the offer from the text of the opinion. The opinion does not state what the offer was in exchange for, when or why it was made, or even if Weed relied on it. Also, it appears the point was not raised in the trial court. Id. In a footnote, however, the Seventh Circuit seems to indicate that Weed's incarceration was a more significant factor in its decision than the mysterious offer:

> The reasons Weed did not file an appearance, did not respond to the notice of default, and did not file at an earlier date the Rule 60(b) motion are all attributable to the peculiar circumstances of being indigent, in a foreign country, and imprisoned in that country, throughout the proceedings. [Emphasis added].

Id. at 913, n. 6.

It would seem that Claimants had at least as much justification for their late filing as did Weed. Indeed, in light of the fact that Weed was released from prison five months before the filing deadline, it would seem that Weed had significantly less justification.[11]

The facts of the instant case are also factually similar to the facts in this Court's decision in Klapprott, *supra*. In Klapprott, the movant sought to set aside a default judgment entered four years earlier in a denaturalization proceeding. Klapprott, 335 U.S. at

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[11] Although it is not stated directly in the opinion, it appears that Weed was an American Citizen, and that he spoke English. These factors may indicate that it was also easier for Weed to communicate with attorneys in the United States.

603, 69 S.Ct. at 385. During the proceeding, Klapprott was seriously ill and could not afford a lawyer. Id., at 604-606, 69 S.Ct. at 384-386. Then he was incarcerated on a selective service violation, and he eventually managed to file a motion to set aside the default judgment from jail. Id. The district court denied the motion and the court of appeals affirmed. Id., at 615-616, 69 S.Ct. at 391. This Court, noting the difficulties Klapprott faxed during the four-year period, reversed the court of appeals and remanded to the district court with instructions to vacate the default judgment and grant Klapprott a hearing on the merits. Id. The result should be the same in this instant case.

3. **The decision by the United States Court of Appeals for the Tenth Circuit that the notice mailed to Claimants satisfied due process conflicts with the decision of the United States Court of Appeals for the Eighth Circuit and the decisions of other United States courts of appeals on the same important matter.**

In the Court of Appeals, Claimants argued that the notice of forfeiture the government mailed to Claimants was inadequate because it failed to specify a deadline for filing a claim and because the notice was not mailed in a timely manner. (App. B at 12a-13a) Claimants thus raised an important constitutional question, i.e., whether the Due Process Clause of the Fifth Amendment requires that notice mailed in civil forfeiture proceedings specify a deadline filing a claim?

In answer to the question, the Court of Appeals held that Claimants were not injured by any inadequacy in the notice and so could not complain thereof. (Id. at 13a-14a) The Court of Appeals noted that the Notice of Arrest and Procedure contained an "outside deadline" of ten days after receipt of the Notice to file a claim, and that Claimants "took no action" within this time period. (Id.) For the same reasons, the Court of Appeals rejected Claimants' argument that notice was not mailed in a timely manner. (Id. at 15a) As discussed below, the decision by the Court of Appeals was erroneous because it assumes that Claimants were required to

respond to defective notice. In addition, the decision of the Court of Appeals conflicts with a decision of the United States Court of Appeals for the Eighth Circuit on the same important question. This Court should therefore grant Claimants' Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals.

The statutory source of the government's obligation to notify interested parties of the deadline for filing a claim in civil forfeiture proceedings is the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules"). Supplemental Rule C(4) requires that the plaintiff publish notice "promptly" after the arrest *in rem*. Rule C(4), Fed.R.Civ.P. The published notice must also describe the time and procedure for filing a claim and answer to the complaint. Id. Any interested party must file a claim either within 10 days after the date of arrest of the property, or within such greater time as may be allowed by the Court. Rule C(6), Fed.R.Civ.P. (App. L at 54a)

In addition to the published notice required by the Supplemental Rules, this Court has recognized that notice by publication is not sufficient when the government can reasonably ascertain the name and address of an interested party. Mullane, 339 U.S. at 317-318, 70 S.Ct. at 658-659. (See Argument 1, *supra*.) In a civil forfeiture case, a notice to interested parties that fails to include a specific deadline for filing a claim fails to satisfy due process requirements and is void. Glasgow v. United States Drug Enforcement Agency, 12 F.3d 795, 798 (8th Cir. 1993).

Since the government knew the names and addresses of Claimants, it was required to mail notice directly to them as well publish notice under Supplemental Rule C(6). Although the government did provide both forms of notice (except to Levoyer Jimenez), neither form of notice specified a deadline for filing a claim. As a whole, therefore, notice in this case failed to satisfy due process concerns. Glasgow, *supra*.

In the instant case, the mailed notice consisted of the Verified Complaint for Forfeiture In Rem (the "Verified Complaint"), the Order for Arrest of Property In Rem (the "Order

for Arrest"), the Warrant for Arrest of Property In Rem (the "Warrant for Arrest"), and the Notice of Arrest and Procedure (the Notice of Arrest"). (App. Q at 66a-67a) The government mailed a copy of each of these documents to Claimants on August 17, 1993. (Id.) However, each of the documents contained different information about the deadline for filing a claim, and it was impossible to determine the actual deadline from any of the documents.

The Order for Arrest provided, in part, as follows:

> THAT Publication of notice as required by Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims shall be made by the United States Marshall, giving persons in interest ten (10) days from the date of publication within which to file a claim and twenty (20) days after filing of the claim within which to file an answer.

The government complied with the Order for Arrest by publishing notice of the proceedings in *The Denver Post* on August 11, 18, and 25, 1993, and on September 1, 1993. (App. B at 6a) As published in *The Denver Post*, the Notice and Advertisement read as follows:

> Any persons having or claiming an interest in or to said property must file his claim as provided for under Supplemental Rule for Certain Admiralty and Maritime Claims' Rule C(6) within 10 days after the *first date of publication of this notice* or within such additional time as may be allowed upon application to the court....
>
> (App. P at 65a) (Emphasis added.)

The Notice of Arrest contained language different from the language in the Order for Arrest. The Notice of Arrest stated that claims must be filed "within ten days after publication of this

Notice, *or within ten (10) days of actual notice of this action, whichever occurs first, or within such additional time as the Court may allow.*" (App. O at 61a) (Emphasis added.) The Warrant for Arrest stated, "all persons claiming an interest in the defendant property...must file their claims with the Clerk of this Court within ten days after publication of the notice, *or after personal notice*, or within such additional time as may be allowed by the Court...."

Although each document states that the deadline for filing a claim is 10 days after publication, none actually *gives* the "date of publication". It is therefore impossible for the reader to determine the deadline as specified by the Order for Arrest. In addition, none of the documents state where the notice would be published or the name of the paper, so the reader doesn't know where to look for the published notice

In addition, the Order for Arrest doesn't provide for a deadline of ten days after "actual notice", as mentioned in the Notice of Arrest. Thus, a claimant reading the Notice of Arrest may think he has ten days to file a claim from the date of his actual notice, when in fact the filing deadline as ordered by the court was an absolute ten days from the "date of publication". The Warrant for Arrest is similar to the Notice for Arrest in that it states that claims must be filed within ten days after publication, "or after personal notice". However, the Warrant for Arrest doesn't contain the language, "whichever occurs first". Thus, each document states the claim-filing deadline differently, and there is no way to know which document is correct.

To make matters worse, the published notice states that the deadline is "10 days after the *first* date of publication", which fact is not noted in any of the mailed documents. (App. P at 65a) Nor does the published notice state anything about an alternate deadline of ten days from the date of actual notice. (Id.) The published notice is consistent with the mailed notice, however, in that it also fails to indicate the date of publication. (Id.) Thus, even if

Claimants somehow saw the published notice, they still wouldn't be able to figure out the deadline for filing a claim.[12]

Because the notice provided to Claimants failed to specify a deadline for filing a claim, it does not pass constitutional muster under Glasgow, *supra*. In Glasgow, the DEA seized $66,000 in cash from a traveler in an airport. Glasgow, 12 F.3d at 796. Later, the DEA sent notice to the traveler of its intent to forfeit the cash. Id. The notice stated, in part, "'The claim of ownership...must be filed within *twenty (20) days* of the *first date* of publication of the notice of seizure in the Wednesday edition of *USA Today*'". Id., at 797. (Emphasis in original.) However, the notice did not state when the "first date of publication" would be. Id., at 798. After reviewing the Wednesday edition of *USA Today* in the record on appeal, the Eighth Circuit held that the failure of the notice to specify a deadline violated due process.

> As this case illustrates, there is a high risk that a written notice that merely refers to an unspecified future edition of this publication will fail to give actual notice of the claim period to all but the most sophisticated claimants. We conclude that known claimants' property interests are too constitutionally significant to be satisfied by this type of notice, particularly because the agency can so easily advise known claimants of precisely when they must file their claims.

The Court of Appeals asserts that the instant case is distinguishable from Glasgow because Claimants had "an outside deadline for filing the claim, ten days after their receipt of the

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[12] The fact that the notice was published in *The Denver Post* may itself be a due process violation, given that the government was aware that both individual Claimants were incarcerated in Ecuador on the date the notice was published. Such notice is not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". Mullane, 339 U.S. at 314, 70 S.Ct. at 657.

Notice of Arrest, yet Claimants chose not to file a claim". (App. B at 14a) What the Court of Appeals fails to recognize is that Claimants were not required to file a claim within ten days, or at any particular time, if the notice provided by the government did not comply with Supplemental Rule C(4) or the Due Process Clause.[13]

A judgment obtained without proper notice or service is "constitutionally infirm" and void, and a motion to set aside default judgment must be granted even if the moving party lacks a meritorious defense to the action. See, Peralta v. Heights Medical Center, Inc., 485 U.S. 80,84, 108 S.Ct. 896, 898-899 (1988). In civil forfeiture cases, a claimant is not required to comply with the ten-day filing deadline of Supplemental Rule C(6) where the government obtains a void judgment, and it is immaterial whether the judgment is void due to lack of jurisdiction or to lack of due process. United States v. Indoor Cultivation Equipment, 55 F.3d 1311, 1317 (7th Cir, 1995) (where judgment void because government did not commence forfeiture proceeding within 60 days, district court has no discretion to deny motion to set aside entry of default judgment); United States v. 84,740.00 U.S. Currency, 900 F.2d 1402, 1406 (9th Cir. 1990) (where government commits procedural errors in executing process, a claimant need not comply with the filing deadline of Supplemental Rule C(6), and district court must grant motion to set aside entry of default judgment, even though claimant did not file claim until two years after entry of default); United States v. $38,000.00 in U.S. Currency, 816 F.2d 1538, 1546 (1987) (claimant not required to meet filing deadline of Supplemental Rule C(6) where government failed to mail notice to one claimant and failed to execute process pursuant to Supplemental Rule C(3)).

According to these cases, Claimants were not required to

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[13] It should also be noted that the District Court file does not reflect when Claimants received the documents, or even if they did. Therefore, there is no way of computing Claimants' "outside deadline" of 10 days after receipt of the notice.

file a claim within 10 days because the notice did not specify a deadline for filing a claim. Although the Notice of Arrest stated that claims must be filed "within ten days after publication of this Notice, or within ten (10) days of actual notice of this action, whichever occurs first", this language did not notify Claimants of the actual deadline because Claimants had not way of knowing when publication occured. In any event, only the Notice or Arrest contained the phrase, "whichever occurs first", and this conflicted with language in the Order for Arrest which was also mailed to Claimants. As in Glasgow, Claimants' property interests are "too constitutionally significant to be satisfied by this type of notice", particularly because the government could easily have advised Claimants of "precisely when they must file their claims". Glasgow, 12 F.3d at 798.

CONCLUSION

This Court should grant Claimants' Petition for Writ of Certiorari because the Court of Appeals decision that the to Levoyer Jimenez was adequate conflicts sharply with relevant and well-settled decisions of this Court. Also, the Court of Appeals decision that the notice mailed to Claimants was adequate conflicts with the Eighth Circuit's decision in Glasgow, *supra*. Finally, the Court of Appeals decision that Claimants' Motion to Set Aside was not filed timely conflicts with a decision of another United States Court of Appeals and a decision of this Court.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed December 7, 1998]

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff- Appellee,	)	
	)	
v.	)	**ORDER**
	)	**No. 97-1250**
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND; AND ACCOUNT NO. 01327947-001.1.840 FORMERLY HELD AT THE BANK VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVAT-BANK, ZURICH, SWITZERLAND, IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORPORATION,	)	
	)	
Defendants,	)	
	)	
SOMATERIA FOUNDATION; FINANCIERA EURO-AMERICANA CORPORATION; JORGE HUGO	)	

Order 97-1250 12/7/98

REYES TORRES; DAYRA MARIA)
LEVOYER JIMENEZ,)
)
Claimants-Appellants.)
_____/

Before EBEL, HOLLOWAY and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 3 5. Judge Holloway would grant the petition for rehearing, however, no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

Order 97-1250 12/7/98

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APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed October 29, 1998]

UNITED STATES OF AMERICA,	)
	)
Plaintiff- Appellee,	)
	)
v.	)
	) **No. 97-1250**
ALL MONIES FROM ACCOUNT NO.	) **District of**
PO-204,675.0, FORMERLY HELD AT	) **Colorado**
THE SWISS BANK CORPORATION	) **D.C. No.**
OF ZURICH, SWITZERLAND; AND	) **93-Z-1652**
ACCOUNT NO. 01327947-001.1.840	)
FORMERLY HELD AT THE BANK	)
VON ERNST UND CIE, PREVIOUSLY	)
WPE WIRTSCHAFTSUND PRIVAT-	)
BANK, ZURICH, SWITZERLAND, IN	)
THE NAMES OF SOMATERIA	)
FOUNDATION AND FINANCIERA	)
EURO-AMERICANA CORPORATION,	)
	)
Defendants,	)
	)
SOMATERIA FOUNDATION;	)
FINANCIERA EURO-AMERICANA	)
CORPORATION; JORGE HUGO	)

REYES TORRES; DAYRA MARIA LEVOYER JIMENEZ,

Claimants-Appellants.

ORDER AND JUDGMENT*

Before EBEL, HOLLOWAY, and MURPHY, Circuit Judges.

In this civil forfeiture proceeding, Somateria Foundation ("Somateria"), Financiera Euro-Americana Corp. ("Financiera"), Jorge Hugo Reyes Torres ("Reyes Torres"), and Dayra Maria Levoyer Jimenez ("Levoyer Jimenez") (collectively "Claimants") appeal the district court's denial of their Motion to Set Aside Entry of Default and Default Judgment ("Motion to Set Aside") and motion to reconsider. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court affirms.

BACKGROUND

The United States filed the underlying civil forfeiture action on August 4, 1993. In its Verified Complaint for Forfeiture *In Rem* ("Verified Complaint"), the United States alleged that the funds in two defendant bank accounts were the proceeds of drug trafficking and money laundering activities

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

conducted by the Reyes Torres family of Ecuador.

A Notice of Arrest and Procedure ("Notice of Arrest") was filed on August 17, 1993. That same day, copies of the Notice of Arrest, the Verified Complaint, an Order for Arrest of Property *In Rem,* and a Warrant for Arrest of Property *In Rem* were sent, by registered mail, to Claimant Somateria, at both a Liechtenstein address and in care of the Swiss Bank Corporation in Zurich; to Claimant Financiera, at both a British Virgin Islands address and in care of the Bank yon Ernst and Cie in Zurich; and to Claimant Reyes Torres at an Ecuador prison. Additionally, the government published notice of the seizure and pending forfeiture of the two defendant accounts in *The Denver Post* on August 11, 18, and 25, 1993 and September 1, 1993. According to the published notice, the deadline for filing a claim was 10 days after "first publication" of the notice.

Claimants did not file a claim or answer and on September 14, 1993, the government filed a Motion for Default Judgment and Final Order of Forfeiture. The district court granted the motion and on October 25, 1993, the court entered a Default Judgment and Final Order of Forfeiture. An Amended Judgment was entered on October 28, 1993. The total amount forfeited was $11,499,068.34.

On October 21, 1994, Claimants filed a Motion to Set Aside Entry of Default and Default Judgment ("Motion to Set Aside"). On December 1, 1994, the government filed a response to Claimants' motion. On December 12, 1994, Claimants filed a motion requesting leave to file a reply brief to the government's response to the Motion to Set Aside or, in the alternative, requesting a hearing. On December 15,

1994, the district court entered an order denying Claimants' Motion to Set Aside without ruling on Claimants' motion requesting leave to file a reply brief. Claimants subsequently filed a Motion for Reconsideration of Denial of Claimants' Motion to Set Aside Entry of Default and Default Judgment ("Motion for Reconsideration"), which the court denied by minute order.

Claimants appealed the district court's denial of their Motion to Set Aside. In an unpublished disposition, this court reversed the district court's denial of Claimants' Motion to Set Aside, holding that the district court should have ruled on Claimants' motion to file a reply brief before it ruled on the merits of the Motion to Set Aside. *See United States v. All Monies from Account No. P0-204,675.0,* No. 95-1095, 1996 WL 375393, at *2-3 (10th Cir. July 5, 1996). This court therefore remanded the case "with direction that the district court, after hearing, consider, and rule on, claimants' motion to file a reply brief before ruling on the motion to set aside." *Id.* at *3.

On remand, the district court granted Claimants' motion requesting leave to file a reply brief. A hearing was conducted on May 9, 1997. At the conclusion of the hearing, the district court granted Claimants' Motion to Reconsider, but again denied Claimants' Motion to Set Aside as untimely. This appeal followed.

On appeal, Claimants allege that (1) the default judgment is void as to Claimant Levoyer Jimenez because she was not mailed notice; (2) the judgment is void because the notice mailed to the other Claimants was deficient in that it failed to provide enough information to enable Claimants to

determine the deadline for filing a claim; and (3) the district court abused its discretion by denying Claimants' Motion to Set Aside as untimely.

NOTICE AS TO CLAIMANT LEVOYER JIMENEZ

Claimant Levoyer Jimenez contends the default judgment is void as to her because the government's failure to mail her notice of the forfeiture proceedings violated her due process rights.[1] It is undisputed that Levoyer Jimenez was not mailed notice of the forfeiture proceeding at the Ecuador prison where she was incarcerated at all relevant times. The government argues, however, that reasonable notice was provided to Levoyer Jimenez through Somateria.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also United States v. Rodgers*, 108 F.3d 1247, 1250 (10th Cir. 1997). When the name and address of an interested party are reasonably ascertainable, due process requires the government to send "[n]otice by mail or other means as certain to ensure actual notice." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); *see also Rodgers*, 108 F.3d at 1251. "Due process does not require, however, that the interested party actually receive notice." *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1316 (10th Cir. 1994). "So long as

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[1] Claimant Levoyer Jimenez is the common-law wife of Claimant Reyes Torres.

the government 'acted reasonably in selecting means likely to inform [the] persons affected,... then it has discharged its burden.'" *Id.* (alterations in original) (quoting W*eigner v. City of New York,* 852 F.2d 646, 649 (2d Cir. 1988)).

This court reviews due process issues which call for legal conclusion *de novo. See United States v. Clark,* 84 F.3d 378, 381 (10th Cir. 1996). Whether the government used means that were reasonably calculated to provide actual notice, however, is a factual determination this court reviews for clear error. *See id.*

Claimant Levoyer Jimenez does not contend that the money from either account was in her name, but instead argues that she was entitled to notice of the forfeiture proceeding because she was both an authorized signer and beneficiary of one of the two forfeited accounts, the Somateria account.[2] Levoyer Jimenez asserts that because the government had knowledge of her whereabouts, it was required to mail notice directly to her.

Under the particular facts of this case, we reject Claimant Levoyer Jimenez's contention that the government was required to mail notice directly to her. To the extent that Levoyer Jimenez was an interested party, the government discharged its burden of providing her notice. The government mailed notice to Claimant Somateria, who was the owner of the Somateria account at the time of the seizure.

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[2] According to Claimants, the Somateria account was managed by Somateria for the benefit of Reyes Torres, Levoyer Jimenez, and their four children.

Notice to Somateria was mailed both to the Liechtenstein law firm, which managed Somateria's affairs, and to the Swiss bank, which held the funds. Levoyer Jimenez testified that she executed an agreement with the Liechtenstein law firm giving individuals at the firm the power to act on her behalf in all matters related to the Somateria Foundation. Under these circumstances, notice to Somateria at the Liechtenstein law firm, which had power of attorney to act on Levoyer Jimenez's behalf, was reasonably calculated to provide Levoyer Jimenez actual notice of the proceeding.[3]

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[3] In Claimants' Motion to Set Aside, Claimants acknowledge that Dr. Wiederkehr, from the firm of Dr. Dr. Batliner & Partenr, was given "mandate" authority by Levoyer Jimenez to manage Somateria's affairs. The dissent argues, nevertheless, that notice to the Batliner law firm in Liechtenstein was not effective as to Levoyer Jimenez because that notice took place after Batliner had withdrawn from representation of Somateria. *See* Dissenting Op. at 2-3 & n.2 (citing affidavit of Reyes Torres). It appears from Levoyer Jimenez's affidavit, however, that she had a relationship with the Batliner firm independent of Batliner's representation of Somateria. In her affidavit, Levoyer Jimenez states as follows:

> I am the legally authorized agent of the Somateria Foundation. I am one of the founders of this foundation, along with the economist Laura Mirella Santacruz Delgado, who helped me create the foundation. Mrs. Santacruz Delgado and I are the only persons authorized to sign any action related to the Somateria account .... Because I do not live in Europe, it was necessary for me to sign a Mandate Agreement or Power of Attorney with the law firm of Dr. Herbert Batliner, Vaduz,

Based on the above, we conclude the means utilized by the government to provide notice to Claimant Levoyer Jimenez were "as certain to ensure actual notice" as mailing

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> Liechtenstein, so that he could act for me in all matters related to the foundation. Therefore, in May 1990, I signed a Mandate Agreement granting full power and authority to Dr. Batliner's firm to sign for me on behalf of Somateria.

This testimony appears to represent a relationship independent of Batliner's relationship with Somateria itself. Accordingly, the ambiguous language cited by the dissent in the Reyes Torres affidavit that "Batliner's officer withdrew representation of the Somateria Foundation" in 1992 says nothing of the status of the relationship between Batliner and Levoyer Jimenez. Furthermore, there is no indication in Levoyer Jimenez's affidavit that Batliner ever terminated its relationship with her. In light of these circumstances, the district court did not err in declining to grant extraordinary relief under Rule 60(b). *See FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998) (holding that although district courts have substantial discretion, Rule 60(b) relief is "extraordinary" and should only be granted in exceptional circumstances).

The dissent further asserts that it is impermissibly speculative to assume the Batliner firm would notify Levoyer Jimenez of the action because her name was not on the caption of the case or the certificate of service. In fact, it is not remotely speculative the Batliner firm would inform Levoyer Jimenez of the case in light of its relationship with her and the fact that she is one of only two authorized signatories for the actions of the Somateria Foundation.

notice to her at the Ecuador prison,[4] especially in light of her and Reyes Torres' testimony that mail sent to them in prison was not always delivered. This court therefore rejects Levoyer Jimenez's contention that the judgment is void because she did not receive adequate notice of the forfeiture proceeding.

ADEQUACY OF NOTICE

Claimants Somateria, Financiera, and Reyes Torres

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[4] Claimants cite *United States v. Woodall*, 12 F.3d 791,794 (8th Cir. 1993), for the proposition that when government officials have actual knowledge of an interested party's whereabouts, due process requires notice to be sent to the individual at that address. The facts of *Woodall*, however, are distinguishable from those in the present case. In *Woodall*, the claimant alleged that the government sent him notice of the forfeiture proceeding at his home address and at jail. *See id.* The district court, however, had released him on bond to a different residence, which he contended was known to the government. *See id.* The government did not mail notice to the claimant at that address, nor did it mail notice to his attorney. *See id.* The *Woodall* court held that if the facts were as alleged by the claimant, the government failed to provide him adequate notice and the forfeiture was therefore void. *See id.* at 795. Unlike *Woodall*, in the present case, the government did not mail notice to an address at which the government was aware Levoyer Jimenez no longer resided. Instead, the government mailed notice to a law firm which Levoyer Jimenez had empowered to act on her behalf in all matters related to Somateria. The issue in the present case, whether notice to the firm was reasonably calculated to provide notice to Levoyer Jimenez, is thus different from the issue addressed by the *Woodall* court.

argue that the Notice of Arrest mailed to them was inadequate because it did not specify a deadline for filing a claim and thus violated their due process rights. Alternatively, they argue that because the notice published in *The Denver Post* stated that all claims must be filed within ten days after the "first publication" of the notice and the date of first publication was August 11, 1993, the deadline for filing a claim was August 21, 1993. They therefore contend that the Notice of Arrest mailed to them on August 17, 1993 was untimely because it did not provide them with adequate time to file a claim before the August 21, 1993 deadline.

The Notice of Arrest mailed to Claimants on August 17, 1993 stated: "All persons claiming the above-described property must file their claims, pursuant to Supplemental Rule C(6),... within ten days after publication of this Notice, or within ten (10) days of actual notice of this action, whichever occurs first, or within such additional time as the Court may allow." Claimants argue that it was impossible to tell from the Notice of Arrest and other documents mailed to them the actual deadline for filing a claim because the documents did not indicate the date notice was published. The Notice of Arrest, however, clearly provided Claimants with an outside deadline. Claimants knew from the Notice of Arrest that while the actual deadline for filing a claim might be earlier, any claim filed more than ten days after they received the Notice of Arrest would not have been timely. Despite Claimants' knowledge that, absent an extension of time granted by the court, they had at most ten days after receiving the Notice of Arrest to file a claim, Claimants took no action during this

time period.[5] Because Claimants took no action to file a claim within this time period, Claimants were not injured by any alleged inadequacy of the Notice of Arrest. This court thus rejects Claimants' challenge to the adequacy of the notice.

This court similarly rejects Claimants' challenge to the timeliness of the notice mailed to them. The district court found that the "ten days after publication" specified by the Notice of Arrest ran from the last date of publication, September 1, 1993, and thus concluded that Claimants were required to file a claim within ten days of receiving the Notice of Arrest, or by September 11, 1993, whichever occurred first. Claimants, however, maintain that the "ten days after publication" ran from the first date of publication, August 11, 1993, and therefore Claimants were required to file a claim by August 21, 1993, even though the Notice of Arrest was not

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[5] Because Claimants knew the time period for filing a claim would expire ten days from their receipt of the Notice of Arrest, yet took no action to file a claim within that time period, this case is distinguishable from *Glasgow v. DE.4,* 12 F.3d 795 (8th Cir. 1993). In *Glasgow,* the Eighth Circuit held that a notice which provided that a claim of ownership "must be filed within *twenty (20) days* of the *first date* of publication of the notice of seizure in the Wednesday edition of *USA Today"* was inadequate because it failed to specify a deadline for filing the claim. *Id.* at 797-99. The claimant in *Glasgow* missed the first publication of the notice and filed a claim shortly after the twenty-day period had expired. *See id.* at 797. Unlike the claimant in *Glasgow,* in this case Claimants had an outside deadline for filing the claim, ten days after their receipt of the Notice of Arrest, yet Claimants chose not to file a claim. Claimants' reliance on *Glasgow* is therefore misplaced.

mailed to them until August 17, 1993.

We need not address whether the "ten days after publication" specified by the Notice of Arrest ran from the first or last date of publication because it is undisputed that Claimants did not file a claim within ten days after receiving the Notice of Arrest. Had Claimants filed a claim within ten days of their receipt of the Notice of Arrest but after August 21, 1993, it would be necessary for this court to determine the applicable deadline and, in light of that deadline, determine whether the Notice of Arrest mailed to Claimants was timely. In this case, however, because Claimants did not file a claim within the ten day period following their receipt of the Notice of Arrest, Claimants suffered no injury from the alleged untimeliness of the Notice of Arrest. This court therefore rejects Claimants' contention that their due process rights were violated by the untimeliness of the Notice of Arrest.

TIMELINESS OF CLAIMANTS' MOTION TO SET ASIDE

Finally, Claimants contend the district court erred in denying as untimely their Motion to Set Aside Entry of Default and Default Judgment, filed pursuant to Federal Rules of Civil Procedure 55(c)[6] and 60(b). Claimants Reyes Torres and Levoyer Jimenez argue that because they were imprisoned in Ecuador, were not able to communicate freely with the

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[6] Federal Rule of Civil Procedure 55(c) provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

outside world, and did not have funds to pursue their claim due to the seizure of their assets, they were justified in filing their Motion to Set Aside on October 21, 1994, nearly a year after entry of the default judgment.

This court reviews the district court's denial of Claimants' Rule 60(b) Motion to Set Aside for an abuse of discretion. *See United States v. Timbers Preserve, Routt County, Colo.*, 999 F.2d 452, 454 (10th Cir. 1993). We will reverse the district court's denial of Claimants' motion "only if we find a complete absence of a reasonable basis and are certain that the district court's decision is wrong." *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1147 (10th Cir. 1990). In determining whether the district court abused its discretion, this court is "mindful that '[r]elief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances.'" *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996) (alteration in original) (quoting *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990)).

Claimants' Motion to Set Aside sought relief from the default judgment pursuant to Rule 60(b)(1) and (3), which provide that "[o]n motion and upon such terms as are just," a court may set aside a final judgment due to "mistake, inadvertence, surprise, or excusable neglect" or due to "fraud..., misrepresentation, or other misconduct of an adverse party."[7] Fed. R. Civ. P. 60(b)(1), (3). Federal Rule

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[7] Claimants' Motion to Set Aside also sought relief pursuant to Rule 60(b)(4), which provides that a court may set aside a final judgment if "the judgment is void." Fed. R. Civ. P.

of Civil Procedure 60(b) requires that a motion seeking relief from judgment on the above grounds "shall be made within a reasonable time, and ... not more than one year after the judgment, order, or proceeding was entered." A Rule 60(b) motion is not made within a "reasonable time" and therefore timely merely because it is filed within one year of the judgment. *See White v. American Airlines, Inc.*, 915 F.2d 1414, 1425 (10th Cir. 1990). Instead, whether a Rule 60(b) motion is filed within a reasonable time "depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981); *see also Planet Corp. v. Sullivan*, 702 F.2d 123, 126 (7th Cir. 1983); *Atchison, Topeka & Santa Fe Ry. Co. v. Matchmaker, Inc.*, 107 F.R.D. 63, 66 (D. Colo. 1985).

In denying Claimants' Motion to Set Aside, the district court relied on the fact that the U.S. Attorney's Office had been contacted by attorneys and agents who inquired about the forfeiture at the request of Reyes Torres family. The court reasoned that "the fact that the attorneys are there makes it very clear ... that these claimants ... knew very well that these funds were being forfeited, and the claims were against the

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60(b)(4). Claimants' request for relief under Rule 60(b)(4) stems solely from their assertions that (1) proper notice was not provided to Levoyer Jimenez and (2) the notice provided to Somateria, Financiera, and Reyes Torres was untimely and inadequate. This court has already rejected these arguments on the merits and, therefore, we do not address Claimants' request for relief pursuant to Rule 60(b)(4) in this section of our opinion.

funds, so they certainly could have done something, even asked for a continuance." The court determined that Claimants "sat on their rights" by taking no action despite knowledge of the forfeiture and the Motion to Set Aside therefore was "not filed timely as required by Rule 60(b)."

The record indicates the Reyes Torres family requested that Attorney Irwin Lichter of Florida inquire into the status of the forfeiture proceedings. In response to the request, Lichter contacted Attorney Richard Tegtmeier of Colorado in February 1994. Tegtmeier, in turn, contacted James Russell of the U.S. Attorney's Office. Tegtmeier testified that Russell described the international scope of the various civil forfeiture and criminal proceedings involving the Reyes Levoyer family and indicated that it might be necessary for an attorney involved in the case to conduct up to fifty depositions at locations in Europe and South America. Tegtmeier then relayed this information to Lichter and discussed a potential retainer. Lichter testified that he attempted to convey the information he had obtained about the forfeiture proceedings from Tegtmeier to Reyes Torres through an intermediary, but was uncertain as to whether Reyes Torres ever received the information.

Additionally, Jose Ontaneda of Chicago, a personal friend of Reyes Torres, testified that at Reyes Torres' request, he traveled to Denver to visit the U.S. Attorney's Office "to find out information about a case involving money taken from Swiss bank accounts." According to Ontaneda's testimony, however, his trip to Denver took place in March 1993, before this present case was filed. It is therefore unclear from the record whether the accounts involved are the same as those in the present case. Ontaneda also testified that while in Denver,

he received a visit from three men who identified themselves as being with the DEA and advised him not to get involved with the case. Ontaneda further testified that in August or September 1993, he contacted Attorney Christopher Miranda about representing Reyes Torres, but was unaware whether Miranda ever contacted Reyes Torres. Finally, Ontaneda testified that he sent Reyes Torres a copy of the Denver yellow pages listing for attorneys.

The original district court order denying Claimants' Motion to Set Aside overstated the amount of contact between the U.S. Attorney's Office and individuals representing Reyes Torres when it stated that the government had presented evidence "that it ha[d] been contacted by numerous attorneys and agents acting on the claimants' behalf." The evidence, however, clearly shows that Reyes Torres was aware of the forfeiture proceedings and had at least some contact with individuals in the United States. In light of this evidence, we cannot say that there was no reasonable basis for the district court's decision that Claimants' Motion to Set Aside was untimely.[8] On remand, the district court noted that the fact

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[8] Claimants rely on *United States v. $48,595.00*, 705 F.2d 909 (7th Cir. 1983), in arguing their Motion to Set Aside was timely filed. In *$48,595.00*, the Seventh Circuit concluded that the claimant's Rule 60(b) motion, filed 49 weeks after entry of the default judgment, was timely. *See id.* at 912-13. In that case, the government seized money from claimant John Weed and his brother, both of whom had just arrived in the United States from Germany. *See id.* at 910-11. The money was seized because Weed and his brother failed to declare the money on a customs declaration form. *See id.* After his arrest, Weed returned to Germany on a personal recognizance bond and was subsequently

that attorneys were inquiring into the forfeiture proceeding made it clear Claimants had notice of the proceedings. The

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arrested and incarcerated in Germany on a separate offense. *See id.* at 911. The government commenced forfeiture proceedings against the money seized from Weed, mailing notice to Weed who was still imprisoned,' to the attorney in the United States who had been appointed to represent Weed at his bond hearing, and to Weed's brother and his attorney. *See id.* No claim was filed. *See id.* The court therefore entered a default judgment in December 1980. *See id.* In July 1981, Weed was released from prison in Germany to stand trial in the United States. *See id.* Following the criminal trial, Weed filed a Rule 60(b) motion to set aside the default judgment. *See id.* The district court denied Weed's Rule 60(b) motion on the ground that Weed lacked a meritorious defense. *See id.* at 912. Reversing the judgment of the district court, the Seventh Circuit held that the combination of "Weed's lack of funds, his imprisonment in a foreign country, the absence of counsel acting on his behalf in the forfeiture proceeding, and Weed's understanding that the Government was going to return half of the seized money ... support the conclusion that the forty-nine week delay in Weed's filing of a Rule 60(b) motion was reasonable." *Id.* at 913.

The present case is factually distinguishable from *$48,595.00*. In the instant case, Claimant Reyes Torres maintained at least some contact with attorneys in the United States and was able to have individuals inquire into the forfeiture proceedings on his behalf despite his imprisonment. Further, the money in the instant case was not in the name of the individual Claimants, but rather was in the name of Somateria and Financiera; both of these Claimants received notice by mail and yet neither responded. Finally, in the instant case, Claimants did not have a belief that absent filing a claim, a portion of the money would be returned. Claimants' reliance on *$48,595.00* is thus misplaced

district court therefore concluded that Claimants were required to do something, even if all they could do was request a continuance. The district court did not abuse its discretion in finding that Claimants were required to take some action upon notice of the forfeiture and that Claimants' Motion to Set Aside was therefore not filed within a reasonable time.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of Colorado is **AFFIRMED.**

ENTERED FOR THE COURT:

/s/_____
Michael R. Murphy
Circuit Judge

No. 97-1250, United States v. All Monies from Account No. PO-204,673, et al.
HOLLOWAY, Circuit Judge, concurring and dissenting:

I am in agreement with the majority in its affirmance of the order of May 9, 1997, denying the Claimants' Motion for Reconsideration as to all the claimants except Ms. Dayra Maria Levoyer Jimenez (Levoyer). She argues that the government failed to mail notice to her in accordance with due process requirements and that such failure was not cured by mailing notice to others. Appellants' Brief at 10; Appellants' Reply Brief at 9. I must agree and hence respectfully dissent

in part.

Ms. Levoyer Jimenez

There appears to be no dispute in our record on these facts: The October 15, 1994, affidavit of Mr. Reyes-Torres (Torres), the common law husband of Ms. Levoyer, represented that the Somateria Foundation account was opened with an initial deposit of approximately eight million dollars; this represented a Swiss deposit in May 1985 that was made by Victor Raul Reyes Torres in the amount of five million dollars and interest earned by that initial deposit. App. at 94-95, ¶¶ 13-15. The original five million dollar deposit was made at the request of Torres, and apparently also by Ms. Levoyer. Id. at ¶ 13.

Claimant Torres's affidavit further represented that Torres's accounts advisor had traveled to Europe in September 1989 "to establish the foundations that would ensure that my wife [Levoyer][1] and my children would be the legal beneficiaries of 80% of the money in the accounts." App. at 94, ¶¶ 13-14 (emphasis added). Ms. Levoyer's affidavit also states that she "was also a beneficiary of the [Somateria] foundation," id. at 104, ¶ 5 (emphasis added), and asks the court to consider "that this money in reality belongs to my children, my husband and myself." Id. at 105, ¶ 7. Thus the evidentiary matter submitted makes an undisputed showing that Ms. Levoyer had a beneficial interest

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[1] Torres's affidavit of October 15, 1994, referred to Ms. Dayra Maria Levoyer Jimenez as his common law wife who was still in prison. App. at 91-92, ¶2.

in the funds seized in the instant forfeiture proceeding.

Torres's affidavit states that in May 1990 his wife traveled to Europe to accept her appointment as legal representative of the foundations and that she immediately assigned that responsibility to a Liechtenstein attorney, Dr. Herbert Batliner. App. at 104, ¶ 14. Ms. Levoyer's affidavit stated that she was one of only two people authorized to sign for the Somateria Foundation and was also a beneficiary of the Foundation. Id. at 105, ¶ 5. The authorized signatures record for Somateria Foundation show Ms. Levoyer was authorized to "sign for the firm" according to an August 1990 record. Id. at 1. Torres's affidavit showed further that in July 1992, attorney Batliner's office withdrew from representation of the Somateria Foundation, not informing Torres of this until December 1993. Id. at 96, ¶ 17-2. This withdrawal by attorney Batliner's firm in July 1992 thus preceded by over a year the August 4, 1993, commencement of the instant forfeiture proceeding. Id. at 33. Thus I feel we must reject the government's argument that notice to the Liechtenstein firm was effective as to Ms. Levoyer. Notice to former counsel could in no way serve as notice to Ms. Levoyer of the instant proceeding.[2]

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[2] To me, it is impermissibly speculative to assume that the law firm would send such instruments or notice of them on to Ms. Levoyer when her name did not appear in the caption of the case or in the certificate of service filed in the case concerning the verified complaint, the Order For Arrest of Property In Rem, and the Notice of Arrest and Procedure. See App. at 33, 44. The certificate of service lists the Somateria Foundation, the Financiera Euro-Americana Corporation and Mr. Jorge Hugo Reyes-Torres, addressed at the Ecuadoran prison, but it makes no mention of Ms.

The government's Answer Brief, p. 11, accepts the fact that "[a]t the time of the forfeiture at issue here, Claimant Levoyer-Jimenez was incarcerated in a women's prison in Ecuador" (citing Claimant's Brief at 13). Ms. Levoyer's affidavit states that she has been in the women's prison since June 1992. App. at 104, ¶ 1. Moreover, her imprisonment at that location was known to the government before the commencement of the instant forfeiture case on August 4, 1993. Id. at 33, 45-46. This is shown by the government's making service to the prison to reach her with notice of earlier proceedings in other cases. Appellee's Supp. App. at 29, 47 (earlier complaints' certificate of service on "Daira Maria Levoyer-Jimenez," et al).

The affidavit of Ms. Levoyer states that she "never received notice of the seizure of the money in the Somateria account." App. at 105, ¶ 5. In its Answer Brief, p. 11, the

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Levoyer. Id. at 44.

The majority suggests that the Liechtenstein lawyer served in a dual capacity, see Majority Opinion at n.3, p. 8, and-that Ms. Reyes-Torres's "ambiguous" statement on the lawyer's withdrawal said nothing about his relationship with Ms. Levoyer. This suggestion is one never raised by the parties and it was not discussed by the district judge in her oral findings and ruling. She merely said from the bench that it "would appear that there was proper notice given to the proper parties, not only Mr. Reyes, but also the bank, also the two foundations, and the notice indicates that they were sent by registered mail." Tr. May 9, 1997 hearing at 30. I would not base a decision on our serious due process issue on such a suggestion as the majority relies on.

government in fact expressly admits that it "did not mail actual notice to Claimant Levoyer-Jimenez," relying only on its claim that it was sufficient to mail copies to Somateria, Financiera, and Mr. Reyes-Torres and to publish notice in the Denver Post on August 11, 15 and 18 and September 1.[3]

Why the government mailed notice to Ms. Levoyer of the earlier forfeiture proceedings (Appellee's Supp. App. at 27, 29, 45, 47) on November 27, 1992, and on January 19, 1993, but failed to do so when the instant forfeiture case was filed on August 4, 1993, is nowhere explained. The government has not argued that when this forfeiture was commenced, it was ignorant of any claim by Ms. Levoyer to the property in question here and instead belabors other points such as its claim that notice to the foundations was sufficient to cover Ms. Levoyer's interest. Appellee's Answer Brief at 11.

The core of the undisputed facts here brings to bear basic due process principles. As it did when it notified Ms. Levoyer less than a year earlier about other forfeiture proceedings (see Appellee's Supp. App. at 27, 29, 45, 47), the government should have mailed notice to her as the Supreme Court instructed in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). After rejecting constitutional objections to published notice to beneficiaries

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[3] The government enumerates the Verified Complaint, the Order for Arrest of Property In Rem, and the Warrant for Arrest of Property In Rem as having been sent by registered mail to Somateria, to Financiera and to Mr. Reyes-Torres, but makes no mention of Ms. Levoyer. Id. at 4.

whose interests or addresses are unknown, the Court held:

> As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicality notice must be such as is reasonably calculated to reach .interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

339 U.S. at 318 (emphasis added). As it did by mailing notice of the instant forfeiture proceeding to Mr. Torres at his place of imprisonment, the government should have given notice by mail to Ms. Levoyer at the women's prison to satisfy the "elementary and fundamental requirement of due process ...." Id. at 314; see also Mennonite Board of Missions v. Adams, 462 U.S. 791,795 (1983).

In United States v. Rodgers, 108 F.3d 1247, 1251 (10th Cir. 1997), we recently applied the due process requirement discussed in Mennonite. There we directed that a DEA administrative forfeiture be vacated where the DEA failed to mail notice of the seizure of property to an owner at a third residence he maintained. This residence, we found, was the most reasonable address to which the notice could have been mailed. Id. at 1252. We charged the DEA with information about Rodgers provided in local authorities' seizure records. Actually, this is a stronger case for Ms.

Levoyer in the sense that her place of imprisonment was known, while we recognized that Rodgers' fugitive status was a factor as to reasonable notification steps. We held it was nevertheless unreasonable not to attempt notice to Rodgers at the residence he had been using. Id. at 1253. Finally in Rodgers we noted that the government did not dispute Rodgers' claim that he did not have actual notice; that is the case here as to Ms. Levoyer who denied getting actual notice. We have noted earlier that "[w]hen the government is aware that an interested party is incarcerated, due process requires the government to make an attempt to serve him with notice in prison." United States v. Clark, 84 F.3d 378, 381 (10th Cir. 1996). That was admittedly not done here.

The cases discussed above by me focus on the due process requirement. However, the forfeiture statute itself mandates that "[w]ritten notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article." 19 U.S.C. § 1607(a)(4) (emphasis added).[4] We are instructed clearly that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional pre-condition to a proceeding which will adversely affect ... property interests of any party ... if its name and address are reasonably ascertainable." Mennonite Board of Missions v. Adams, 462 U.S. at 800 (emphasis in original). For reasons given above, I feel there is no question about Ms. Levoyer being a "known present beneficiar[y] of known place of residence," within Mullane, 389 U.S. at 318. The government

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[4] This provision is made applicable to forfeitures under the drug laws by 21 U.S.C. § 881(d).

does not dispute such knowledge on its part.

I cannot conclude that mail addressed to a foundation through a legal firm in Liechtenstein that formerly represented Somateria was as certain to ensure actual notice to Ms. Levoyer as mailing to her directly where she was known to be in custody. The doubtful effectiveness of such notice reaching Ms. Levoyer is apparent particularly because the caption and certificates of service for the papers sent out by 'the government on the instant forfeiture case did not carry Ms. Levoyer's name. See App. at 32, 44. Since the fundamental demand of due process was not observed, the forfeiture judgment was void as to Ms. Levoyer. And "[i]f voidness is found, relief is not a discretionary matter; it is mandatory." V.T.A., Inc. v. AIRCO, Inc., 597 F.2d 220, 224 n.8 (10th Cir. 1979) (citing 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2862). Moreover, relief under Rule 60(b)(4) "is not subject to any time limitation." V.T.A., Inc. v. AIRCO, Inc., 597 F.2d at 224 & n.9.

Jorge Hugo Reyes-Torres and the Foundations

With respect to Mr. Torres and the Somateria and Financiera Foundations, I agree with the affirmance of the denial of the motion to set aside the default and default judgment. I find no abuse of discretion in the ruling that as to these parties, the motion to set aside the default was untimely.

Accordingly, I concur in the result of the majority's order and judgment upholding the rulings against Mr. Torres and the Foundations. However, for the reasons set out earlier, I respectfully dissent with respect to the ruling against Ms. Dayra Maria Levoyer Jimenez.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE ZITA L. WEINSHIENK

[May 9, 1997]

Case No. 93-Z-1652 and 93-Z-2374

UNITED STATES OF AMERICA,	) Charlotte Maples
Plaintiff,	)
v.	)
ALL MONIES AND ACCOUNTS HELD AT THE BANK OF LIECHTENSTEIN AG, et al.	) William Kelso) Harvey Steinberg
Defendants,	)

SUZANNE CLAAR, REPORTER
JANINE R. AGUERO, DEPUTY CLERK

COURTROOM MINUTES

HEARING: HEARING ON MOTION TO RECONSIDER AND MOTION TO DISMISS

08:40 A.M. **COURT IN SESSION (Courtroom)**

MINUTES: Court comments that this case was remanded from the Tenth Circuit.

08:44 - Mr. Steinberg's argument.

09:09 - Government's argument.

09:20 - Rebuttal argument by Mr. Steinberg.

09:24 - Court's oral findings of fact and oral conclusions of law which are incorporated herein by reference as if fully set forth.

ORDERED: **Motion For Reconsideration Of Denial Of Claimants' Motion To Set Aside Entry Of Default And Default Judgment (Doc. #25) filed 12/23/94 in Case No. 93-Z-1652 is GRANTED as to the Motion For Reconsideration. After reconsideration given, the Motion To Set Aside Entry Of Default And Default Judgment is DENIED.**

09:30 - Mr. Steinberg's argument.

09:40 - Government's argument.

09:44 - Rebuttal argument by Mr. Steinberg.

09:50 - Court's oral conclusions of law which are incorporated herein by reference as if fully set forth.

ORDERED: **Motion To Dismiss Under Rule 12, Fed. R.Civ. P. (Doc. #20) filed 08/21/95 in Case No. 93-Z-2374 is DENIED pursuant to U.S. v. All Funds On Deposit In Any Accounts Contained in the Name of Meza, 63 F.3d 148 (2nd Cir. 1995).**

9:55 - COURT IN RECESS

APPENDIX D

TRANSCRIPT OF ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PAGES 28-31

... will, for lack of a better term, a party. But yet when it comes to serving her, even though they know she is in the Ecuadoran jail, they don't bother to serve her personally. But they felt it necessary in terms of getting control of the money they make sure they invite her participation in Switzerland.

Finally in terms of this no money issue, how do you prove a negative? The government says we think we have seized ever penny he has and that's been our mission. He files an affidavit that as a result of everything the government has done we have no money and the government says you haven't proven that. How does one prove the negative? So I think that you can't accept the government's argument that we haven't carried our burden in that when in fact they concede that their mission has been to seize everything that they know about. Coupled with his affidavit, what else could we do? Thank you, Judge.

THE COURT: Thank you. This matter was originally heard and considered by a very thoughtful person who was a very thoughtful judge, and that is Judge Jim Carrigan.

The order has considered -- the order of December 14th has considered many of the issues raised by the defendants, the claimants actually in this case.

I would note that this notice was given in the proper form. The matter was filed in the proper form.

At the time the foundations appear to be the owners of the property and the claimants, and there was full notice given to the foundations. It was not anything to do with the United States that the foundations were involved. That was either Mr. Reyes or someone for him or whoever established these foundations.

So it wasn't just that Mr. Reyes was given notice, the foundations which he established, and which I think we can almost presume, knew where he was and how to contact him, and would let him know when they received notice, were also given notice.

August 17th of 1993 all the papers were sent, and the papers that were sent indicated it was ten days after publication. The last publication was September 1.

So that is very clear that ten days after September 1 is September llth. It wasn't a question of two or three days. It was a question, it was relatively short, but it was a question of the remaining days of August, 13 days of August or 14 days of August, plus up to September llth. So that's a question of 25 days, not two or three.

The notice was given in the regular form. There was nothing procedurally lacking in the way that this case was handled. The fact that it involved a lot of money or it involved someone who was Spanish speaking does not mean that you just try to do something different than what the rules required.

It would appear that there was proper notice given to the proper parties, not only Mr. Reyes, but also the bank, also the two foundations, and the notice indicates that they were sent by registered mail.

When you read Judge Carrigan's decision he is aware of the facts that were pointed out by counsel here. He was aware that claimants Reyes and Levoydr were incarcerated in Ecuador.

He was also aware that there were attorneys who contacted the U.S. Attorney's Office, and I think the issue is not whether they actually entered their appearance, but the fact that the attorneys are there makes it very clear, and made it very clear to Judge Carrigan, that these claimants, Reyes and Levoydr, and his wife, knew very well that these funds were being forfeited, and the claims were against the funds, so they certainly could have done something, even asked for a continuance. They did nothing.

Judge Carrigan says in his decision plaintiff has presented evidence that it has been contacted by numerous attorneys and agents acting on the claimants' behalf with respect to forfeiture of the funds. Thus, I find that the claimants were not justified in waiting nearly a year before challenging the entry of default and default judgment, and conclude that their motion was not filed timely as required by Rule 60(b).

I agree with Mr. Steinberg that defaults are not favored, but also it's very clear that reversals of judgments under Rule 60(b) are not favored.

For the same reasons that were considered by Judge Carrigan back in December 14th, 1994, and now have been fully argued before this Court, a second judge, here on May 9th, 1997, the Court reaches the same decision that the motion was not timely filed, the claimants sat on their rights.

Not only are defaults disfavored but strongly -- perhaps even more strongly setting aside final orders also are disfavored. This Court has done what the Court of Appeals has ordered me to do, and that is to give a full hearing to both the sides.

I have done so, and I cannot see any reason to change the order by Judge Carrigan, and, accordingly, the motion filed by the claimants to set aside the default and the default judgment will be denied, and we certainly are very open to have the 10th Circuit look at this again if that's what you wish to do. But the Court has heard all the arguments put forward by claimants, and I am not convinced that there should be any change in the order.

Accordingly, the motions are denied, and the forfeiture stands, and we leave it up to these claimants as to whether they want to take any further action.

This order now covers two cases, 93-1652 and 93-2374.

MS. MAPES: Your Honor, I don't believe that's ....

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed July 5, 1996]

UNITED STATES OF AMERICA,	)
	)
Plaintiff- Appellee,	)
	)
v.	)
	)ORDER AND
	)JUDGMENT
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND; AND ACCOUNT NO. 01327947-001.1.840 FORMERLY HELD AT THE BANK VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVAT-BANK, ZURICH, SWITZERLAND, IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORPORATION,	)No. 95-1095)(D.C. No.)93-C-1652))(District of)Colorado)
	)
Defendants,	)
	)
and	)
	)
SOMATERIA FOUNDATION;	)

FINANCIERA EURO-AMERICANA CORPORATION; DAYRA MARIA LEVOYER JIMENEZ, and JORGE HUGO REYES-TORRES,

Claimants-Appellants.

ORDER AND JUDGMENT*

Before BRORBY, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and LUCERO, Circuit Judge.

This is an appeal from an order of the district court denying defendants' motion to set aside an entry of default and a default judgment in a civil forfeiture proceeding. We reverse.

The United States filed the present civil forfeiture proceeding in the United States District Court for the District of Colorado on August 4, 1993. In its verified complaint the United States alleged that monies in two defendant bank accounts were proceeds of drug trafficking and money laundering activities conducted by one Jorge Hugo Reyes Torres and the "Reyes Family" of Ecuador. No claim or answer was filed within the time allowed by law, and on

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

September 14, 1993, the United States filed a Motion for Default Judgment and Final Order of Forfeiture. On October 21, 1993, the district court granted the Motion for Default Judgment, and on October 25, 1993, entered a Default Judgment and Final Order of Forfeiture. The total amount forfeited was $11,499,068.34.

On October 21, 1994--361 days after the entry of Default Judgment and Final Order of Forfeiture--the claimants, some of whom were named defendants, filed a Motion to Set Aside Entry of Default and Default Judgment, seeking relief under Fed. R. Civ. P. 60(b)(1), 60(b)(3), 60(b)(4) and 55(c). The district court then ordered the United States to respond to the Motion to Set Aside on or before November 7, 1994. The United States thereafter sought, and obtained, an extension of time until December 1, 1994, to respond to the motion. Such response was filed on December 1, 1994. In its response the United States alleged, *inter alia,* that the Motion to Set Aside was not filed within a "reasonable time," as required by Fed. R. Civ. P. 60(b), because sometime prior to the filing of the motion, the office of the United States Attorney in Denver, Colorado, had been contacted by agents and attorneys who indicated they were representing Reyes Torres and his family, claimants herein, and that Reyes Torres and the other claimants thereafter did nothing until virtually the last day.

On December 12, 1994, the claimants filed a motion for leave to file a reply brief to the government's response to the Motion to Set Aside and for an extension of time, or, in the alternative, a request for a hearing. The claimants alleged, *inter alia,* that the "Claimants should be permitted to reply to the Government's allegations and explain to the Court why the

attorneys who contacted the Government did not file a motion [to set aside] sooner." The government filed an objection thereto.

On December 14, 1994, the district court in a three-page order denied claimants' Motion to Set Aside. In its order the district court noted that the United States had filed a response in opposition to the Motion to Set Aside and indicated that the "issues had been fully briefed and [that] oral argument would not materially facilitate the decision process." Whether the district court knew of claimants' pending motion to file a reply brief to the government's response is not known. We assume the district court did not know of the motion for leave to file a reply brief since it made no mention of any such motion. We do know that claimants' motion to file a reply brief to the government's response to the Motion to Set Aside was never ruled on by the district court.

In its order denying the claimants' Motion to Set Aside, the district court held that the motion was not filed within a reasonable time after entry of the Default Judgment. In thus holding, the district court spoke as follows:

> Plaintiff has presented evidence, however, that it has been contacted by numerous attorneys and agents acting on the claimants' behalf with respect to forfeiture of the funds. Thus, I find that the claimants were not justified in waiting nearly a year before challenging the entry of default and default judgment, and conclude that their motion was not filed timely as required by Fed. R. Civ. P. 60(b).

The claimants thereafter filed a motion to reconsider in which they alleged, *inter alia,* that the district court should have allowed them to file a reply brief to the government's response to claimants' Motion to Set Aside and indicated that if allowed to file a reply they would challenge "the very allegation in the Government's Response that the Court relied on in denying Claimants' Motion [to set aside] ...." The motion to reconsider was denied on December 27, 1994, without comment, by minute order.

As indicated in its response to the claimants' Motion to Set Aside the default judgment, the government stated that, months prior to the filing of the Motion to Set Aside, the United States Attorney's office in Denver, Colorado had, on more than one occasion, been contacted by persons stating that they were representing the claimants in the civil forfeiture proceeding, and that the claimants did not thereafter file their Motion to Set Aside within a "reasonable time." In denying the Motion to Set Aside, the district court stated, in so many words, that it relied on such representations in the government's response.

It would appear to us that the district court at the time it denied the Motion to Set Aside was not aware that the claimants sought to controvert, or at least explain, the representations of the government in its response to the Motion to Set Aside and asked leave to file a reply brief to the government's response. It is true that in their motion to reconsider, the claimants relied, in part, on their earlier motion for leave to file a reply brief to the government's response. The district court, however, simply denied the motion to reconsider, without mention of the fact that there was an outstanding motion for leave to file a reply brief to the

government's response.

Be that as it may, we think that better practice requires that the district court rule on the claimants' motion to file a reply brief to the government's response to claimants' Motion to Set Aside before ruling on the merits of the Motion to Set Aside. If the motion be granted, and a reply brief is filed, the government's assertions in its response that persons representing the claimants had contacted the United States Attorney's office long prior to the date when the Motion to Set Aside was actually filed, might well be explained, if not disputed. The property seized in the proceeding is something more than *de minimus,* and we think there should have been a more detailed hearing on the matter. We note, incidentally, that Reyes Torres and his wife were at all times pertinent incarcerated in prison in Ecuador, their native country.

In sum, the district court denied the motion to vacate on grounds set forth in the government's response which claimants by their motion to file a reply brief sought to dispute or explain, which motion was never ruled on.

Judgment reversed and case remanded with direction that the district court, after hearing, consider, and rule on, claimants' motion to file a reply brief before ruling on the motion to set aside.

Entered for the Court

/s/_____
Robert H. McWilliams
Senior Circuit Judge

95-1095, United States v. Ali Monies in Account No. PO-204.675.0 (Lucero, J., dissenting)

We review the denial of a Rule 60(b) motion for abuse of discretion. White v. American Airlines, 915 F.2d 1414, 1425 (10th Cir. 1990). Because I see no abuse of discretion in the way th district court handled the motion to file a reply brief or in its ultimate decision that claimants' motion under Fed. R. Civ. P. 60(b) was untimely, I respectfully dissent.

Claimants were not deprived of any process to which they were entitled: neither the Federal Rules of Civil Procedure nor the Local Rules for the District of Colorado provide for a reply brief to be filed in the context of Fed. R. Civ. P. 60(b). Because claimants did not tender a reply brief along with their motion, the district court had no way to evaluate whether allowing such a brief to be filed would serve the ends of justice or merely increase delay. The district court's statement, in its order denying the Rule 60(b) motion, that the case was "fully briefed," indicates that the court did not feel that additional briefing would assist in its resolution of this matter. This was well within its discretion. Even if it were not, any procedural error here would be harmless.

The burden is on the claimants to justify their delay in filing the Rule 60(b) motion. See White, 915 F.2d at 1425. Claimants failed to meet that burden in their opening brief. On that basis alone, the district court's ruling is appropriate. The district court was eventually made aware of the matters claimants wished to raise in their reply brief in claimants' motion to reconsider the denial of the Rule 60(b) motion, which included affidavits of two attorneys and a private

individual, describing their contacts with the United States Attorney regarding this case. Although the district court did not specifically refer to these affidavits in denying the Motion to Reconsider, we must presume that the court read and considered the information contained therein. Whatever ambiguity may have remained regarding the request to file a reply brief was effectively resolved by denial of the motion for reconsideration. There is nothing before us upon which I would conclude that denial of the motion to reconsider was an abuse of discretion. I would affirm.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed December 14, 1994]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)ORDER
	)CASE NO.
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, et al.,	)93-C-1652
	)
	)
Defendants.	)
	/

ORDER

CARRIGAN, J.

Plaintiff, the United States of America, commenced this action for forfeiture in rem against funds located in two Swiss bank accounts, alleging that they were proceeds of drug trafficking and money laundering activities conducted by Jorge Hugo Reyes Torres and the Reyes family of Ecuador. A warrant for arrest of property in rem was executed on August 5, 1993. Thereafter, the plaintiff published notice of the arrest in the Denver Post. No claims or answers to the

complaint were filed timely. Therefore, on September 14, 1993, the plaintiff filed a motion for default judgment and final forfeiture order. This court granted the motion on October 21, 1993, and judgment was entered on October 25, 1993.

Claimants Reyes Torres, Dayra Maria Levoyer Jimenez, the Somateria Foundation, and Financiera Euro-Americana have moved for an order setting aside the entry of default and default judgment pursuant to Fed. R. Civ. P. 55(c) and 60(b). Plaintiff has filed a response in opposition. The issues have been fully briefed and oral argument would not materially facilitate the decision process. Jurisdiction is founded upon 28 U.S.C. §§ 1345 and 1355.

Plaintiff argues that the claimants' motion should be denied because it is untimely. Rule 60(b), Fed. R. Civ. P., provides that a motion to set aside a final judgment "shall be made within a reasonable time, and . . . not more than one year after the judgment . . . was entered." Claimants' motion was filed 361 days after the default judgment was entered. However, a motion pursuant to Fed. R. Civ. P. 60(b) "is not timely merely because it has been filed within one year of the judgment." White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990). Rather, to be filed within a reasonable time, delay in filing a motion must be sufficiently justified. Id.

Claimants Reyes Torres and Levoyer Jimenez have been incarcerated in Ecuador since before this action was commenced. They contend that they were unable to assert their interests in the funds any earlier because, with only limited contact with the outside world, they were unable to

retain an attorney. Plaintiff has presented evidence, however, that it has been contacted by numerous attorneys and agents acting on the claimants' behalf with respect to forfeiture of the funds. Thus, I find that the claimants were not justified in waiting nearly a year before challenging the entry of default and default judgment, and conclude that their motion was not filed timely as required by Fed. R. Civ. P. 60(b).

Accordingly, IT IS ORDERED that the motion to set aside entry of default and default judgment is denied.

Dated at Denver, Colorado December 14, 1994.

BY THE COURT:

/s/ _____
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX G

FIFTH AMENDMENT
UNITED STATES CONSTITUTION

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

19 U.S.C. § 1607 (a)

Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If --

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

APPENDIX I

21 U.S.C. § 881 (d)

(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

APPENDIX J

Rule 55(c)
Federal Rules of Civil Procedure

Rule 55(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

APPENDIX K

Rule 60(b)
Federal Rules of Civil Procedure

Rule 60. Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a

judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX L

Rule C(6)
Supplemental Rules for Certain Admiralty and Maritime Claims

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(Added Feb. 28, 1966, eff. July 1, 1966, and amended Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

APPENDIX M

AUTHORIZED SIGNATURES SOMATERIA FOUNDATION ACCOUNT NO. PO-204'675, DAYRA LEVOYER

Firm	SOMATERIA Foundation, Vaduz
Nature of Business	Foundation
Domicile	P.O. Box 461, FL - 9490 Vaduz
Registered Office	

To be completed with surnames and first names of the persons authorized to sign for the firm, the indication of their capacity (partner, director, manager, secretary, attorney, mandatory, etc.) And method of signing **(sole or joint signature)** as well as specimens of signatures.

Should the Register of Commerce not or not yet reveal these persons authority to sign for the above mentioned firm, we hereby grant this authority explicitely.

The **mandatories** ("Handlungsbevollmächtigte") are **explicitely** authorized to sign or accept bills of exchange or similar documents and to take loans for the firm.*
*To delete if not desired.

Authorized Signatures

Limitations of authority are ineffective as towards the Bank unless specified hereunder.

The powers of the persons mentioned below shall remain effective and shall not be deemed to be revoked as far as the relations to the Bank are concerned until written notice of revocation in due form has been received by the Bank.

Surnames, first names, capacity

Method of signature (sole or jointly by any two)

/s/_____

/s/_____
Dayra Levoyer - Sole

I/We confirm that the above mentioned persons are authorized to sign on behalf of my/our firm in the method described and that the above are their true signatures.

Vaduz, den 28. August 1990 rie

Firm's Signature
SOMATERIA Foundation
/s/_____

APPENDIX N

AUTHORIZED SIGNATURES [GERMAN], SOMATERIA FOUNDATION, ACCT. NO. PO-204'675, DR. DR. HERBERT BATLINER AND DR. IUR ALEX WIEDERKEHR

Rechtsverbindliche Unterschriften

Name (Firmabezeichnung)	SOMATERIA Foundation, Vaduz
Geschäftsart	Stiftung
Wohnort	Postfach 461, FL - 940 Vaduz
Genaue Adresse	

Namen und Vornamen der zeichnungsberechtigten Personen mit Angaben, in welcher Eigenschaft sie zeichnen (ob als Geschäftsinhaber. Verwaltungsrat, Direktor, Prokurist, Handlungsbevollmächtigter usw.) Und welcher Art die Zeichnungsberechtigung ist **(Einzel- oder Kollektivunterschrift).** Falls die Zeichnungsbefugnis dieser Personen nicht bereits dem Handelsregistereintrag zu entnehmen ist, wird diese Befugnis Ihnen hiemit ausdrücklich erteilt.

Authorized Signatures - German

Jede Einschränkung der Zeichnungsbefugnisse muss ausdrücklich erwähnt werden, widrigenfalls die aus dem vorliegenden Verzeichnis sich ergebenden Befugnisse unbeschränkt gültig sind.

Die **Handlungsbevolimächtigten** sind **ausdrücklich** zur Unterzeichnung von Wechselengagements und zur Aufnahme von Darlehen Ermächtigt.*
*Wenn nicht zutreffend bitte streichen.

Unabhängig von anderslautenden oder fehlenden Eintragungen im Handelsregister sind die in diesem Verzeichnis angeführten Unterschriftsberechtigungen so lange gültig, als sie nicht durch ausdrückliche Mitteilung an die Bank widerrufen werden.

Die Bank ist berechtigt, aber nicht verpflichtet, den Nachweis der Unterschriftsberechtigung zu verlangen.

Namen, Vornamen, Zeichnungseigenschaften und Wohnort

Art der Zeichnungsberechtigung (einzein oder killektiv zu zweit)

Unterschriften

/s/_____
Dr. Dr. Herbert Batliner
Stiftungsrat - einzeln

/s/_____
Dr. iur. Alex Wiederkehr
Stiftungsrat - einzeln

Authorized Signatures - German

Die Echtheit und Gültigkeit der vorstehenden Unterschriften sowie die daraus sich ergebenden Befugnisse werden hiermit bezeugt.

Vaduz, den 28. August 1990 rie

Firmaunterschrift

SOMATERIA Foundation
/s/_____

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed August 17, 1993]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)**NOTICE OF**
	)**ARREST**
v.	)**AND**
	)**PROCED-**
ALL MONIES FROM ACCOUNT NO.	)**URE**
PO-204,675.0, FORMERLY HELD AT	)**Civil Action**
THE SWISS BANK CORPORATION OF	)**No. 93-C-**
ZURICH, SWITZERLAND AND	)**1652**
ACCOUNT NO. 01 327947-001.1.840	)
FORMERLY HELD AT THE BANK	)
VON ERNST UND CIE, PREVIOUSLY	)
WPE WIRTSCHAFTSUND PRIVAT-	)
BANK, ZURICH, SWITZERLAND, IN	)
THE NAMES OF SOMATERIA	)
FOUNDATION AND FINANCIERA	)
EURO-AMERICANA CORP.,	)
	)
Defendants.	)
	/

NOTICE OF ARREST AND PROCEDURE

Notice of Arrest and Procedure 8/17/93

The United States of America, by and through the United States Attorney for the District of Colorado, states:

That the United States of America filed a Verified Complaint for Forfeiture In Rem pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881 for the forfeiture of the defendant property.

That the United States Marshals Service executed a Warrant for Arrest of Property In Rem against the defendant property on August 5, 1993.

That interested parties must be provided with an opportunity to be heard in opposition to the civil complaint for forfeiture pursuant to the Supplemental Rules of Admiralty and the Federal Rules of Civil Procedure. All persons claiming the above-described property must file their claims, pursuant to Supplemental Rule C(6), with the Clerk of the United States District Court, at Denver, within ten days after publication of this Notice, or within ten (10) days of actual notice of this action, whichever occurs first, or within such additional time as the Court may allow. Answers to the Complaint must be filed within twenty days after filing the claim. Copies of these documents must be provided to the undersigned Assistant United States Attorney. Unless all interested parties file their claims and answers within the specified time, a default pursuant to Rule 55 will be noted and forfeiture will be sought of the interest in defendant property following the completion of notice by publication.

That persons with an interest in the property subject to forfeiture can petition the Attorney General of the United States pursuant to 21 U.S.C. 881(d) and 19 U.S.C. 1618. The

petition should be filed with the undersigned Assistant United States Attorney, pursuant to 28 CFR 9.3(a) within thirty days of the date petitioner received notice of seizure.

Dated: August 16, 1993

Respectfully submitted,

JAMES R. ALLISON
Interim United States Attorney

/s/_____
JAMES S. RUSSELL
Assistant United States Attorney
1961 Stout St., Ste. 1100
Denver, Colorado 80294
(303) 844-3885

APPENDIX P

THE DENVER POST
AFFIDAVIT OF PUBLICATION

STATE OF COLORADO
CITY AND COUNTY OF DENVER

I, Rosemary Reitz, of said City and County of Denver, of lawful age, being first duly sworn on oath, depose and say:

That I am the Class Supervisor of THE DENVER POST, a Colorado corporation, that said company is the owner and publisher of the newspaper, THE DENVER POST; that I have personal knowledge of all the facts set forth in this affidavit; that said THE DENVER POST is a daily newspaper within the meaning of Chapter 109, Article I, Sections 1 to 8, inclusive, Colorado Revised Statutes of 1953, and amendments thereof, and that said newspaper had prior to January 1, 1936, and has ever since that date, been admitted to the United States mails as second-class matter, under the provisions of the Act of Congress of March 3, 1879, and amendments thereof; that said newspaper is printed and published daily and has its principal office and place of business in said City and County of Denver, and has a general public circulation in said City and County, and throughout the State of Colorado; that said newspaper has been so printed, published and circulated as a public daily newspaper of general circulation uninterruptedly and continuously during the period of more than six (6) months next prior to the first issue thereof containing the annexed legal notice and

advertisement.

The annexed legal notice and advertisement was published on August 11, 18, 25 - 1993 & September 1, 1993 in the regular Editions of said Newspaper, and that, therefore, said legal notice and advertisement were published in a Newspaper duly qualified for that purpose within the meaning of said above mentioned and all other relevant Statutes and Acts of the General Assembly of the State of Colorado.

/s/_____
Rosemary Reitz

Subscribed and sworn to before me this 2nd day of September, A.D. 1993.

My commission expires April 8, 1996.

Witness my hand and notarial seal.

/s/_____
Notary Public

NOTICE AND ADVERTISEMENT

Ad appeared in Class 1200 - Legal Notices

NOTICE OF ARREST AND SEIZURE, UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO. Docket No. 93-C-1652. Parties: UNITED STATES OF AMERICA, Plaintiff v. ALL MONIES FROM ACCOUNT NO. PO-204,675.0 FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND AND ACCOUNT NO. 01 327947-001.1.840 FORMERLY HELD AT THE VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVATBANK, ZURICH, SWITZERLAND IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORP., Notice is hereby given that on August 5, 1993 the U.S. Marshals Service arrested: The above mentioned property, pursuant to a warrant for arrest In rem, issued by the Clerk of the Court, on August 4, 1993, for the District of Colorado upon the filing of a verified complaint in the above action commanding the U.S. Marshals Service to seize, arrest, and take possession of the property described herein-above and against such property, and to make due return upon sold Warrant as provided by law. Any persons having or claiming an interest in or to said property must file his claim as provided for under supplemental rule for certain Admiralty and Maritime Claims' Rule C(6) within 10 days after the first publication of this notice or within such additional time as may be allowed upon application to the court, and must file their answer to the complaint herein within 20 days after he or she files his or her claim. Jack N. Egnor, U.S. Marshal, District of Colorado. By: Benny L. Balley, Supvr., Deputy U.S. Marshals.

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed August 17, 1993]

UNITED STATES OF AMERICA,	)
	)CERT. OF
Plaintiff,	)SERVICE
	)CIVIL
v.	)ACTIONNO.
	)93-C-1652
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND; AND ACCOUNT NO. 01327947-001.1.840 FORMERLY HELD AT THE BANK VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVAT-BANK, ZURICH, SWITZERLAND, IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORPORATION,	)
	)
Defendants.	)
	/

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 1993, true

copies of the VERIFIED COMPLAINT FOR FORFEITURE IN REM, ORDER FOR ARREST OF PROPERTY IN REM, WARRANT FOR ARREST OF PROPERTY IN REM, and NOTICE OF ARREST AND PROCEDURE were mailed, via registered mail, to:

Somateria Foundation
Postfach 461
9490 Vadez
Lichtenstein

Somateria Foundation
c/o Swiss Bank Corporation
P.O. Box 8010
Zurich, Switzerland

Financiera Euro-Americana Corporation
Wickhans Cay
Tortola
British Virgin Islands

Jorge Hugo Reyes-Torres
Penal Garcia Moreno
Calle Rocafuertey Cumada
Sector San Rogue
Quito, Ecuador

Financiera Euro-Americana Corporation
c/o Bank yon Ernst und Cie
P.O. Box 782 8026
Zurich, Switzerland

/s/_____
Office of the U.S. Attorney

APPENDIX R

IN THE DISTRICT COURT
OF COLORADO OF THE UNITED STATES

[Dated October 15, 1994]

UNITED STATES OF AMERICA,	)
	)
Summons (Takes into custody, [sic]	)**AFFIDAVIT**
	)**CIVIL**
v.	)**ACTIONNO.**
	)**93-C-1652**
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND; AND ACCOUNT NO. 01327947-001.1.840 FORMERLY HELD AT THE BANK VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVAT-BANK, ZURICH, SWITZERLAND, IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORPORATION,	)
	)
Defendants.	)
_____/	

AFFIDAVIT OF JORGE HUGO REYES-TORRES AND DOCUMENTARY EVIDENCE

Affidavit of Jorge Hugo Reyes-Torres 10/15/94

COMES NOW, Jorge Hugo Reyes-Torres, and being duly advised and under oath, hereby deposes and states the following:

1. I, Jorge Hugo Reyes-Torres, request that the court set aside the entry of default and the default judgment entered in this case, and that the court permit me to file a claim for the funds seized by the United States government. I affirm that I have read the Motion to set aside the entry of default and the default judgment, which was prepared by my attorney, Mr. Kelso. The facts in the motion are true and accurate to the best of my knowledge and belief. In support of my request and the Motion, I also declare the following:

2. I am a citizen of Ecuador, a licensed engineer and businessman. I am 41 years old. I am currently imprisoned at the Men's Social Rehabilitation Center No. 1 in the city of Quito, Ecuador. I have been in prison since June 1992. On that date, my home and business of the Rancho San Antonio, located to the west of Quito, was raided and seized without a legal search warrant by the Ecuadorian National Police ("ENP") and agents of the United States Drug Enforcement Agency ("DEA"). As part of the raid, I was brutally arrested and immediately taken to jail, as was my common-law wife, Dayra Maria Levoyer Jimenez, and most of my family and employees. My wife is still in prison.

On that date, 60 people were arrested, of whom 40 have been released and in the next few days another 10 will be released, we will all have the same luck, as we did not commit any crime.

3. As a result of the actions of the ENP and the DEA,

my wife and I have lost our freedom and all our property, without exception. Our four children, Nataly Constanza Reyes-Levoyer, age 3, Stephany Maria Reyes-Levoyer, age 9, Dayra Isabel Reyes-Levoyer, age 12 and Jorge Hugo Reyes-Levoyer, age 6, were placed in the care of Jenny Torres-Rodriguez, and are essentially orphans.

4. Despite the devastation to my family and business caused by the illegal actions of the DEA and the ENP, no charge to date against me or my wife has been proven, and they have not been able to bring any evidence whatsoever against us or any of the accused, to the point that our acquittal is near. In no other country of the world has any member of my family, my wife and I had any problems due to drug-trafficking or any related crimes.

5. I am making this claim to the funds seized by the United States government because of the allegations made by the government in which I am accused of drug trafficking and money laundering, which activities are false, since the funds seized in the accounts have no connection to any criminal activity. Furthermore, I am an Ecuadoran citizen of a sovereign state, and the documents which the DEA agents arbitrarily took are proof of a flagrant violation of the United Nations Convention drawn up in Vienna on December 19, 1988, which my country, Ecuador, signed on June 21, 1989, and which was ratified by means of decree 1329 of March 15, 1990 and published in the Official Registry No. 396 of March 15, 1990.

6. I declare directly and without qualification that my activities and businesses have always been legitimate and legal and that my income has always been derived from my

legitimate and legal resources.

7. Although I am an experienced engineer, in the course of the last 10 years I have established and built businesses in ranches, farms and trade. These activities, which have been operated from the Rancho San Antonio, were conducted and owned by the Compañía Agrícola Industrial S.A. ("Agrícola"). The Rancho San Antonio is owned by "Agrícola", a company which was incorporated on February 27, 1963.

8. At the time of my arrest, (1) the ranch was planted with over two thousand hectares of African palm. It was also planted with corn, soybeans and other grains. In addition to these crops, Agrícola was exporting bananas and cocoa, the earnings of which generated millions of dollars a year from exporting bananas. At that time, Agrícola had 7,700 head of cattle, which produced over one million dollars annually from the production of meat and a half million dollars annually from the production of milk and milk products.

(1) The Rancho San Antonio is approximately 2,800 hectares in size, not 90,000 acres as was maliciously stated in the complaint filed by the United States. One hectare is approximately 2.47 acres, which means that the actual size of the ranch is 6,900 acres. I should clarify that the ranch has been gradually increasing in size, and is now about 2,500 hectares bigger than in 1985.

Agrícola also did business in rice, soybeans and corn, which produced additional revenues. It also had other leased properties that were efficiently managed, such as the El Prado property that produced five thousand liters of milk a day.

9. All the aforementioned activities and businesses are documented in the records that were seized during the raid on Rancho San Antonio in June of 1992. Therefore, the governments of the United States and Ecuador already have documented proof of the sources of my income. The United States also has bank records for the seized accounts from 1985 to the date of seizure. The United States received these documents from the Swiss government prior to the seizure of the accounts. With all this documentation, the United States government should be able to verify everything that I have stated here.

10. With respect to the funds seized from the Swiss Bank Corporation, account number PO-204,675.0 (the Somateria account), these funds were the property of the Somateria Foundation, a legal and "moral entity" organized under the laws of Liechtenstein.

11. The origin of the funds seized from the Somateria account can been investigated because of a voluntary division of the assets of my parents, Victor and Gloria, which took place in 1979. These assets were divided as a result of my father's affair with another woman, with whom he had two children out of wedlock. My mother demanded that my father liquidate their assets and divide them among the children from their marriage, including myself and my eight brothers and sisters. (2) My wife and I decided to invest our portion of this distribution, which was approximately 2.5 million U.S. dollars, in order to ensure the future of our children. By mutual agreement, we have maintained the funds in my wife's and the children's names. (3)

12. The funds were initially deposited in two banks,

the Banker's Trust in Panama, and in the Irving Trust in Miami, Florida. The Banker's Trust account was opened in 1980 with an initial deposit of approximately 480,000 dollars. The Irving Trust account was also opened in 1980, with an initial deposit of approximately two million dollars. Both accounts increased substantially from 1980 to 1985, earning interest at an average 18% annually during that period.

(2) My parents' fortune prior to the division of the assets was substantial. My father had accumulated dozens of real estate properties and other assets through his businesses undertaken as a rancher and lender. The source of his fortune is also legitimate in all respects and can be verified if necessary. My father is now retired and lives in Ecuador with my mother. (3) I also have a son by another woman. My son is 19 years old and his name is Diego Fernando Reyes-Brito. He lives with his mother Julia Brito-Arevalo.

13. The money deposited in the Swiss Bank Corporation is completely legitimate, as this deposit was generated by means of a check from the Banco Internacional of Ecuador in May of 1985 against a foreign bank account, in the amount of five million dollars, in the name of Victor Paul Reyes-Torres, who traveled to Zurich, Switzerland, accompanied by Jorge Salazar-Vaca, who was at that time the Head of Foreign Commerce of the Banco Internacional, and who recommended opening the deposit in the Swiss Bank Corporation. The reason for transferring this money from Ecuador to Switzerland was fundamentally because our country had a 60% annual inflation rate, and the interest rates in the 1980% were higher in Europe and the United States than they were in Ecuador, around the 1980's money could be put in a major bank in Switzerland or the United States for up

to 20% a year in U.S. dollars; not so in Ecuador, [where] annual rates were 12% in sucres, so that it didn't even cover inflation. Anybody who knows anything about economics would have made that decision, especially someone like me, a commercial engineer with extensive economic knowledge. The deposit was opened for five million dollars in June 1985, in the name of Victor Raul Reyes-Torres, who we had asked to supervise the opening of the deposit.

14. In September 1989, my accounts advisor traveled to Europe to establish the foundations that would ensure that my wife and my children would be the legal beneficiaries of 80% of the money in the accounts. Later, in May 1990, my wife traveled to Europe to accept her appointment as the legal representative of the foundations, a responsibility she immediately assigned to the Liechtenstein attorney, Dr. Herbert Batliner. Dr. Batliner's firm was authorized to make decisions and act on behalf of the foundations while my wife was out of the country.

15. The Somateria Foundation was created in September 1989, due to the individual initiative of the law office of Dr. Batliner, who had a full and general power of attorney. We were not informed of the creation of this foundation, nor that the funds or monies that were in the name of the La Buena Esperanza Foundation and were substituted in name on behalf of Somateria [sic]. The name was changed to the Somateria Foundation in May of 1990. The foundation's account was opened with an initial deposit of approximately eight million dollars, which represented the initial principal amount plus the interest earned by the five million dollars deposited in May 1985. Virtually [all?] the funds remained in the Somateria account until the seizure in

June 1993, by which time the principal balance of the account had increased to eleven million dollars.

16. To conclude, the seized funds can all be directly investigated from the documentation of the legitimate sources. The funds have never had any connection to any illegal activity whatever that might be. The United States has no right to seize these accounts, especially if one knows about the history and sources of these funds from the records seized at the Rancho San Antonio and obtained from the Swiss authorities. Flagrant violation of the United Nations Convention.

17. 1. Until very recently it has been impossible for me to make a claim to the funds in the seized accounts. As I said before, I have been in jail since June 19, 1992. It was not possible to use the telephone here in the prison until January 1994, due to the restrictions imposed on me. Furthermore, until January 1994 I was not allowed to leave the cell except for eight hours a week. The prisoners of the other wings can [go?] to the yard from 6:00 a.m. to 7:00 p.m. From 7:00 p.m. to 10:00 p.m. they stay inside the wing and at 10:00 p.m. the doors of the cells are locked. We have limitations on visits; only five family members can visit us, and they always have to carry a visitor's identity card. The wing where I am being held is guarded by the Ecuadorian National Police, a unique circumstance which violates the constitution and laws of Ecuador and the regulations governing penitentiaries in Ecuador, and this is done under the auspices and orders of the D.E.A. The other prisoners are guarded by penitentiary guides, civilians, which is what is legal. The other prisoners also have the legal assistance of their attorneys, who can come into the prison 24 hours a day

without needing a special identity card or authorization. I have to request special permits for each visit of an attorney and the visits can only be for a limited time. The visits from my family members are also limited. The other prisoners have eight hours for their family member visits; my visits are limited to two hours on visiting days. My telephone calls are limited to twelve minutes a day, and I must divide the minutes among the people I am going to call. All my mail is opened before it is delivered to me, with the aggravation that they hold it according to the convenience of the D.E.A. and E.P.N. I am sure that several letters sent to me were not delivered, because the senders of those letters told me that they had sent them. I cannot even send letters to my wife, because they are opened before she receives them and the privacy stipulated in the constitution of Ecuador is violated.

2. The first visit I had from an attorney from the United States was in September 1993. The attorney Dr. Irwin Lichter came to the prison to speak to me, but we were not allowed to speak in private. We had to speak in a hallway, with no chairs, in front of a broken window. It was very cold arid we were told we had little time to speak. Dr. Lichter speaks Spanish, but when we started the interview, the official who is the Chief of Security of this wing, Major Washington Barklay accused me of not having informed him that the attorney spoke Spanish, a detail which I didn't know, which is why permission had been obtained to bring in an interpreter, since he couldn't run the risk of not understanding me and losing the high fees for this sole visit. As a result of this incident, I was locked in my cell for four days without food. Since then I have not been able to obtain other permits for another visit by a attorney from the United States, until August 24, 1994, when Dr. Kelso visited me for the first

time. I contacted Dr. Caicedo in mid-1993, and he recommended Dr. Irving Litcher [sic]. In view of the fact that I couldn't retain Dr. Lichter during his September 1993 visit, I decided to retain Dr. Caicedo in November 1993 so that he would help me with international legal matters. To my knowledge, except for Dr. Litcher's [sic] recommendation, Dr. Caicedo' did not do anything else on my behalf. During the last three months Dr. Caicedo has not answered any telephone calls or faxes sent to him. His secretary always has an excuse to justify his absence. After losing contact with Dr. Caicedo, I had to organize the legal defense of our interests. I was never able to personally contact the attorneys in Switzerland or Lietchenstein [sic]. In July 1992, Dr. Batliner's office withdrew representation of the Somateria Foundation, and they did not inform us of this particular until December 1993, by means of a letter-report from Dr. Caicedo after a trip he made to Switzerland at the end of 1993. For all of these reasons, it has not been possible for me to make the claim on time. After contacting Dr. Kelso in August 1994, he acted quickly, visiting me in Ecuador and investigating the case. Since my meeting with Dr. Kelso in August 1994, he and I have been working together to file this motion.

18. Everything stated in this affidavit is true, and most of this is documented in the records that are in the possession of the United States government. As a result of the incorrect and illegal conduct of the governments of Ecuador, the United States and Switzerland, my life and the lives of my family have all been destroyed. I beg the court to consider my

family's suffering and to set aside the erroneous judgments in this case and we [sic] to be able to begin to repair that which can be repaired.

/s/_____
Jorge Hugo Reyes-Torres
October 15, 1994

(Seal)

APPENDIX S

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)**AFFIDAVIT**
	)**CIVIL**
v.	)**ACTIONNO.**
	)**93-C-1652**
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, FORMERLY HELD AT THE SWISS BANK CORPORATION OF ZURICH, SWITZERLAND; AND ACCOUNT NO. 01327947-001.1.840 FORMERLY HELD AT THE BANK VON ERNST UND CIE, PREVIOUSLY WPE WIRTSCHAFTSUND PRIVAT-BANK, ZURICH, SWITZERLAND, IN THE NAMES OF SOMATERIA FOUNDATION AND FINANCIERA EURO-AMERICANA CORPORATION,	)
	)
Defendants.	)
	/

AFFIDAVIT OF DAYRA MARIA
LEVOYER JIMENEZ

Affidavit of Dayra Maria Levoyer Jimenez - undated

COMES NOW Dayra Maria Levoyer Jimenez, and under oath deposes and states the following:

1. My name is Dayra Maria Levoyer Jimenez. I am the wife of Jorge Hugo Reyes Torres. I am being held in the women's prison in Quito, Ecuador. I have been in prison since June 1992.

2. I am the legally authorized agent of the Somateria Foundation. I am one of the founders of this foundation, along with the economist Laura Mirella Santacruz Delgado, who helped me create the foundation. Mrs. Santacruz Delgado and I are the only persons authorized to sign any action related to the Somateria account. (EXHIBIT ____). Because I do not live in Europe, it was necessary for me to sign a Mandate Agreement or Power of Attorney with the law firm of Dr. Dr. [sic] Herbert Batliner, Vaduz, Liechtenstein, so that he could act for me in all matters related to the foundation. Therefore, in May 1990, I signed a Mandate Agreement granting full power and authority to Dr. Batliner's firm to sign for me on behalf of Somateria. (EXHIBIT ____).

3. Before signing the Mandate Agreement, Dr. Batliner's firm established the Somateria Foundation and issued the regulations and by-laws.

Since the date the Mandate Agreement was signed, Dr. Batliner acted on behalf of Somateria on various occasions. He modified the regulations and bylaws on two occasions, and changed the name of the foundation from Buena Esperanza to Somateria. He monitored the various deposit investments made in the Swiss Bank Corporation for Somateria. He also

supervised the account's deposits and drafts, although there were very few of these.

4. I am sure the United States government was aware of my role in the Somateria Foundation, because the economist who traveled with me to Switzerland to establish the foundations, Mrs. Santacruz Delgado, gave all the documents to the DEA. All the bank records and all the documents related to the foundation were in Mrs. Santacruz Delgado's possession, and she gave them to the DEA.

5. I never received notice of the seizure of the money in the Somateria account. I believe I should have been notified because I was one of the only two people authorized to sign for the foundation, and I was also a beneficiary of the foundation. I do not understand why I was not notified.

6. The reasons for not filing a claim to the money sooner are the same reasons stated by my husband, Jorge Hugo Reyes Torres. I have been in the prison in Quito, Ecuador since June 1992 and until only recently my contact with the outside world was very limited. All the information provided by my husband with regard to the limitations concerning telephone, mail and access to attorneys also applies to me.

7. The money in the Somateria account came from my husband's parents and it has been earning interest for over 13 years. The money has no connection to any illegal or drug transactions. The money has remained virtually intact for at least the last seven years prior to being seized, because my husband and I wanted this account to be an investment that would ensure the future of my children. I beg the court to

consider that the government of the United States took this money erroneously and that this money in reality belongs to my children, my husband and myself.

/s/_____
Dayra Maria Levoyer Jimenez

APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)AFFIDAVIT
	)CIVIL
v.	)ACTIONNO.
	)93-C-1652
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, ET AL.,	)
	)
	)
Defendants.	)
	/

AFFIDAVIT OF ATTORNEY IRWIN G. LICHTER

Personally appeared before me, the undersigned authority, IRWIN G. LICHTER, who, after being duly sworn and cautioned, deposes and states as follows:

1. I am an attorney at law licensed to practice in the State of Florida since 1972. I am also a member of numerous federal district and appellate courts throughout the United States. My practice is almost exclusively federal criminal defense litigation.

2. I was retained to travel to Quito, Ecuador, in September, 1993, for the purpose of interviewing Jorge Hugo Reyes-Torres regarding his brother, Ramiro Reyes-Torres. Immediately after my conversation with Jorge Hugo Reyes-Torres, I flew to Colombia, where I interviewed Ramiro Reyes-Torres in Bogota. This was my only personal contact with Jorge Hugo Reyes-Torres.

3. Subsequently, in approximately August, 1994, when Ramiro Reyes-Torres was extradited to the United States, I briefly met with him in the Marshal's holding cells in the downtown federal courthouse.

4. Sometime between my visit with Jorge Hugo Reyes-Torres in Quito, Ecuador, and the date that Ramiro Reyes-Torres was extradited to the United States, I received communications from the Reyes-Torres family requesting that I inquire into the status of the forfeiture proceedings in Denver, which I did by contacting Attorney Richard Tegtmeier of Colorado Springs, Colorado. I thereafter attempted to convey the information obtained to Jorge Hugo Reyes-Torres in Quito, Ecuador. However, I am uncertain as to whether he ever received this information because I do not recall any further contact until just prior to the extradition of his brother in August of 1994. I was never able to send correspondence directly to him but always had to deal through intermediaries.

5. Based upon my personal experience in visiting with Reyes-Torres in the prison in Quito, Ecuador, I know that he faced enormous obstacles in trying to obtain information or respond to the various forfeiture actions that had been filed while he was in prison. My observation was that he was

severely hampered in attempting to communicate with lawyers in the United States by telephone, and my understanding was that all of his financial assets had been stripped from him by the Ecuadorian Government.

6. I have no information that Jorge Reyes-Forres was wilfully neglecting his forfeiture cases. Given the conditions of his incarceration, it is surprising that he was able to formulate a response at any time.

FURTHER AFFIANT SAYETH NOT.

/s/_____
IRWIN G. LICHTER

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

SWORN TO AND SUBSCRIBED before me this 21st day of December, 1994.

/s/_____
Deborah Shepherd
Notary Public, State of Florida

My Commission Expires: Feb. 22, 1996

Personally known __X__
Produced I.D. _____
Type of I. D. produced _____

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)**AFFIDAVIT**
	)**ACTIONNO.**
v.	) **93-C-1652**
	)
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, ET AL.,	)
	)
Defendants.	)

/

AFFIDAVIT OF ATTORNEY
RICHARD L. TEGTMEIER

I, Richard L. Tegtmeier, being first duly sworn, state and aver as follows:

1. I am an attorney licensed to practice law in the State of Colorado.

2. I have never entered my appearance in the referenced action, nor have I ever entered into an attorney/client relationship with Jorge Hugo Reyes-Torres, or any member of the Reyes-Torres, Reyes-Levoyer family.

3. The only contact or involvement that I have had with this case consisted of one phone call to the U.S. Attorney's Office at the request of an attorney in Miami, Mr. Irwin Lichter. To the best of my recollection, I was contacted by Mr. Lichter on February 28, 1994. Mr. Litchter asked that I contact the U.S. Attorney's Office to inquire into the status of various civil forfeiture actions in which the Reyes-Levoyer family had an interest. Mr. Lichter told me that he was considering representing the Reyes-Levoyer family in connection with certain civil forfeiture and criminal cases that were pending at the time, and that he would like me to consider acting as local counsel in these matters.

4. In response to Mr. Lichter's request, I contacted James Russell of the U.S. Attorney's Office. Mr. Russell described the huge international scope of the various proceedings and indicated that a negotiated settlement of the actions was probably impossible. Mr. Russell estimated that it may be necessary to conduct up to 50 depositions at various locations in Europe and South America.

5. After my conversation with Mr. Russell, I contacted Mr. Lichter. Mr. Lichter and I discussed a potential retainer for my services in light of the enormous amount of time and costs that would apparently be required. Mr. Lichter indicated that he would discuss the matter with his client, but he never contacted me regarding the matter again.

6. Since the time of the above-described activities, I have had absolutely no involvement with this case or any of the individual defendants or claimants.

Further affiant sayeth naught.

/s/_____
Richard L. Tegtmeier

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)**AFFIDAVIT**
	)**ACTIONNO.**
v.	) **93-C-1652**
	)
ALL MONIES FROM ACCOUNT NO. PO-204,675.0, ET AL.,	)
	)
	)
Defendants.	)
	/

AFFIDAVIT OF JOSE ONTANEDA

I, Jose Ontaneda, being first duly sworn, state and aver as follows:

1. I am a resident of Chicago, Illinois, and a personal friend of Jorge Hugo Reyes-Torres and the Reyes-Levoyer family of Quito, Ecuador.

2. In the Spring of 1993, I went to Quito, Ecuador, to visit my father. I also visited with Jorge Hugo Reyes-Torres in prison. Mr. Reyes-Torres asked me to visit the office of the

United States Attorney to find out information about a case involving money taken from Swiss bank accounts. I do not know or remember the particular case about which Reyes-Torres asked me to inquire.

3. As a favor to Reyes-Torres, upon my return to Chicago from Ecuador, I purchased a ticket to Denver and made an appointment to visit the office of the United States Attorney. This was in March, 1993. I spoke to a woman at the office named Patricia Smith. Ms. Smith told me that her office represented the United States Government, so she was unable to assist Reyes-Torres or myself. She explained that Reyes-Torres was fighting against the U.S. Government, and that she was not allowed to assist Reyes-Yorres or give me advice on how to help him.

4. Before we returned to Chicago, I received a visit from three Men who identified themselves as being with the DEA. They asked me some questions about my involvement with Reyes-Torres, and I explained that I was born in the same town as Reyes-Torres and was in Denver as a personal favor for Reyes-Torres, but that I knew nothing about the case besides that. The men advised me that they had checked on me and my family and determined that we were an honest and good family. The men advised us to not get involved with the case or Reyes-Torres any further.

5. The visit with the men from the DEA was frightening to me and my family, so we returned immediately to Chicago without taking any further action on behalf of Reyes-Torres at that time.

6. Later that year, I believe in August or September

of 1993, I contacted Mr. Christopher Miranda about representing Mr. Reyes-Torres. Mr. Miranda, who speaks Spanish, told me that he would call Reyes-Torres and check into the matter, but I don't know if he ever did. Finally, I sent Reyes-Torres a copy of the yellow pages listing for the attorneys in Denver, and that was the last effort I made on behalf of Reyes-Torres. I spoke to no other lawyers other than Mr. Miranda, and I did not find a lawyer to work on behalf of Reyes-Torres.

7. I know nothing further about the case or how Reyes-Torres was finally able to hire a lawyer.

Further affiant sayeth naught.

/s/_____
Jose Ontaneda

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

On this 22nd day of December, 1994, before me personally appeared the person named above, and who signed this document in my presence and acknowledged that the signature was voluntary.

/s/_____
Cynthia L. Cello

Witness my hand and official seal.

My commission expires: December 6, 1995